SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 936.

THE UNITED STATES, APPELLANT,

vs.

THE FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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a In the Court of Claims.

FIDELITY TRUST COMPANY, FORMERLY THE FIDELITY Insurance, Trust and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased,
vs.
THE UNITED STATES.
No. 30020.

I.—PETITION AND AMENDED PETITIONS.

The claimant filed its original petition on the 4th day of June, 1907. Subsequently, to wit, on the first day of February, 1910, by leave of court the claimant filed its amended petition, and on February 12, 1910, in lieu of former petition and amended petition by leave of court, claimant filed its second amended petition, which is as follows:

1 *2nd amended petition and exhibits. Filed February 12, 1910.*

In the Court of Claims.

FIDELITY TRUST COMPANY, FORMERLY THE FIDELITY Insurance, Trust and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased,
vs.
THE UNITED STATES.
No. 30020.

Second amended petition. Filed February 12, 1910.

To the honorable the chief justice and the judges of the Court of Claims:

Your petitioner, Fidelity Trust Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased, by this its second amended petition respectfully represents:

2 I.

That it is a corporation duly organized and incorporated under the laws of the Commonwealth of Pennsylvania and by its charter is authorized, inter alia to act as executor, administrator, or trustee of the estates of deceased persons.

II.

On the 13th day of June, 1898, the President of the United States approved an act, entitled "An act to provide ways and means to meet war expenditures, and for other purposes." (30 U. S. Stat. L., 448.) Pursuant to section 29 thereof taxes were assessed and collected upon legacies and distributive shares of personal property passing from

the estates of persons who died subsequent to the approval of said act. The portions of said section 29 material to this case are as follows:

"SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transfered by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

3 "First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

* * * * * * *

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

III.

Heretofore, to-wit, on the 13th day of July, 1895, Walter H.
4 Tilden, then in life, and being a citizen of the United States, and a resident of the city of Philadelphia, Commonwealth of Pennsylvania, duly executed and acknowledged his last will and testament. Certified copy of the same being filed with original petition herein, marked "Claimant's Exhibit A," and prayed to be read and considered as a part of this second amended petition. The portions of said last will and testament material to this case are the twelfth, fifteenth, and sixteenth paragraphs thereof, which are in words and figures as follows:

"Twelfth: I give and bequeath to Mary Wadleigh Stokes, a niece and namesake of my deceased wife, all my silver plate, cut glassware, pictures, books, and ornaments of every description contained in my dwelling house, No. 1636 Green street, Philadelphia, and also the free use and occupancy of said house and all the furniture and utensils therein, so long as she may wish to reside therein. It is my will that no inventory or appraisement be filed or account be taken of the articles contained in my said dwelling house.

"Fifteenth: I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real and personal, unto The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, its successors and assigns, in trust, to hold the same, either as at present invested or in such securities as to my said trustee may be deemed safe, and to collect and receive the rents, interest, dividends, and income therefrom, and pay the same over, less all proper charges thereon, to the said Mary Wadleigh Stokes, in quarterly payments, during all the period of her natural life, and in case her mother, Frances Wadleigh Stokes, should survive her daughter, then the said The Fidelity Insurance, Trust and Safe Deposit Company, trustee, shall pay to her one thousand dollars per annum, in quarterly payments of two hundred and fifty dollars ($250.00) each during all the period of her natural life, and the said The Fidelity
Insurance, Trust and Safe Deposit Company shall, after the
5 decease of the said Mary Wadleigh Stokes and her mother, hold what remains of the principal of my residuary estate and property upon the further trust to grant, convey, assign, and transfer the same to the Home for Aged Couples of the City of Philadelphia; provided, however, that the said home shall by legal process have its corporate title and name changed to that of the Tilden Home for Aged Couples of the City of Philadelphia; but in case the said Home for Aged Couples of the City of Philadelphia should be unable or unwilling to accept the devise and bequest aforesaid made to it under the condition above named, then and in that case the said The Fidelity Insurance, Trust and Safe Deposit Company shall convert my residuary property and estate aforesaid into money, and divide the same according to its best judgment, and in such sums as it may deem best, among the most worthy charitable institutions

in the city of Philadelphia, without regard to denominational or sectarian affiliation or connection, except that among the institutions intended in such case as above recited to be so benefited shall be the Hospital of the Protestant Episcopal Church of Philadelphia, Christ Church Hospital of Philadelphia, and also the before-named Home for Aged Couples of the City of Philadelphia.

"Sixteenth: I hereby constitute and appoint The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia to be the executor of this my last will and testament, and I direct that the commissions chargeable by my said executor and trustee shall be at the rate of three per cent upon the capital and income of said estate and no more."

On the 2d day of July, 1896, the said Walter H. Tilden, then in life and being a citizen and resident as aforesaid, duly executed and acknowledged a codicil to the above-mentioned will. A certified copy of said codicil is filed with original petition herein, and forms a part of "Claimant's Exhibit A," heretofore referred to and prayed to be read and considered as a part of this second amended
6 petition. The portions of the said codicil material to this case are in words and figures as follows:

"I, Walter H. Tilden, of the city of Philadelphia, make this codicil to my last will and testament, dated July 13, 1895.

"Whereas in the sixth paragraph of my will I have bequeathed to Elizabeth C. Tilden the mortgage of four thousand dollars upon her property on Fourth street, South Boston, Mass., and directed the cancellation thereof.

"And whereas the said Elizabeth C. Tilden has sold the said property since the making of my will, now I do revoke the bequest and direction with regard to the said mortgage in the said paragraph and I do further direct that the trustees of my residuary estate shall, out of the income thereof, during the continuance of the trust provided for in the 15th item of my said will, pay to the said Elizabeth C. Tilden the sum of five hundred dollars annually in quarterly payments, and upon her death, during the continuance of the said trust, out of the income thereof to pay the said amount to her two daughters Adeline and Ella, or the survivor of them, and upon the death of the survivor of said annuitants, the said annuity shall go as is directed for the rest of the income of my residuary estate. All the annuities directed in my said will and codicil shall run from the date of my death and shall be free of collateral inheritance tax. In all other respects I confirm my will."

IV.

The said Walter H. Tilden departed this life on the 16th day of March, 1899. Said last will and testament and codicil were never revoked or modified by said testator, and they were duly admitted to probate and record in the office of the register for the probate of wills and granting of letters of administration in and for the city and county of Philadelphia, as aforesaid, as the last will and
7 testament and codicil of the said Walter H. Tilden. Elizabeth C. Tilden, a beneficiary named in said last will and testament

and codicil, survived said testator, Walter H. Tilden, and is still alive. Your petitioner duly qualified as executor and trustee thereunder, and on the 29th day of March, 1899, letters testamentary on the estate of the said Walter H. Tilden were duly granted to your petitioner, as will more fully and at large appear by reference to a duly certified copy of said letters testamentary, filed with original petition herein, marked "Claimant's Exhibit B," and prayed to be read and considered as a part of this second amended petition. Your petitioner is still executor and trustee as aforesaid, and such authority has never been revoked or modified. Your petitioner has duly and strictly complied with all the terms of and directions contained in said last will and testament and codicil.

V.

Section 29 of the act entitled "An act to provide ways and means to meet war expenditures, and for other purposes," as above in part set forth, was repealed by an act approved by the President of the United States on the 12th day of April, 1902, and entitled, "An act to repeal war-revenue taxation, and for other purposes" (32 U. S. Stat. L., 96). Said repealing act took effect July 1, 1902.

VI.

On June 27, 1902, the President approved an act entitled "An act to provide for refunding taxes paid upon legacies and bequests," etc. (32 U. S. Stat. L., 406). The portion of said act material to this case is section 3, which is as follows:

8 "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

VII.

Subsequent to the date of the death of said Walter H. Tilden, your petitioner was notified by the local collector of internal revenue for the first district of Pennsylvania, which district includes the city of Philadelphia, aforesaid, to make return to him of the legacies and

bequests passing under the last will and testament of said Walter H. Tilden, deceased. Your petitioner made such return in writing on the 8th day of June, 1900, and thereafter, to-wit, on the 16th day of August, 1900, paid to such collector, pursuant to his demand and assessment made, the sum of $5,600.90, being an alleged legacy tax upon the alleged then present worth of the income during life and upon a bequest valued at $500, both to Mary Wadleigh Stokes, a beneficiary named in said will as above set forth.

9 Said sum of $5,600.90 was duly turned over and delivered to the United States by said collector in the usual and ordinary course of the conduct of the duties of the said collector.

The legacy return made by petitioner, above referred to, set forth each of the legacies bequeathed by said testator. The portions thereof material to this case are as follows:

Names of persons entitled to beneficial interest in said property	Mary Wadleigh Stokes.
Age	29.
Relationship of beneficiary to person who died possessed	None.
Clear value of legacy	$74,678.68.
Amount taxable	$74,678.68.
Rate for every $100	$7.50.
Amount of tax	$5,600.90.
Remarks	Miss Stokes receives the income for life of the residuary estate, viz. $120,303.94 after payment of the above annuity, and also a specific legacy valued at $500. See Exhibit "A" attached for calculation.

There was attached to said legacy return a certain memorandum entitled "Exhibit A," being copy of calculations made by said collector of internal revenue, and which showed in part the manner in which said legacy tax of $5,600.90 was calculated. Such memorandum is in words and figures as follows:

EXHIBIT A.

Calculation showing how value of legacy to Mary Wadleigh Stokes is obtained.

Amount of residuary personal estate	$120,303.94
	.04
The income upon which at 4% is	$4,812.1576
10 Deduct annuity of $500 payable to Elizabeth C. Tilden and after her death to her daughters Adeline and Ello	500.
	$4,312.15
Mary Wadleigh Stokes being 29 years old, the annuity value for that age taken from official table is 17.20225, which multiplied by 4312.15 is	$74,178.68
Add specific legacy	500.
Total clear value for legacies	74,678.68
The tax rate per hundred is	7.50
Amount of tax	$5,600.90

VIII.

The collector of internal revenue, as aforesaid, in accordance with instructions of the Commissioner of Internal Revenue, but not in obedience to any requirement or authorization by any law then in force, for the purpose of ascertaining the alleged present value of the income, payable quarterly, during life, to the said Mary Wadleigh Stokes, from the residuary estate of said Walter H. Tilden, used and adopted certain mortuary tables or a series of estimates of the average expectancy of life of individuals of different ages. Said tables also showed the alleged present value to persons of various ages of an annuity of one dollar. In the preparation of such tables the rate of four per centum per annum was the rate of interest arbitrarily assumed. By the use of said tables it was further arbitrarily assumed that the income from the above shown residuary estate would, during each year of the natural life of the said Mary Wadleigh Stokes, equal exactly four per centum thereof, viz, $4,812.1576, from which
11 was deducted the annuity of $500, payable to Elizabeth C. Tilden, and after her death to her daughters, Adeline and Ella, leaving a supposed net annual income to the said Mary Wadleigh Stokes of $4,312.15. And it was also so assumed by the use of said tables that Mary Wadleigh Stokes would live exactly 30.205 years. Copy of said tables are filed herewith marked "Claimant's Exhibit E," and prayed to be read and considered as a part of this second amended petition. With said assumed annual income, viz.: $4,312.15, the alleged present worth of such a sum, payable annually during a period of years, equal to the supposed expectancy of life of the said Mary Wadleigh Stokes, viz, 30.205 years, was calculated to be $74,178.68. The said sum of $74,178.68 in the aforesaid calculation represents the total of the present worths of $4,312.15 to be paid each year for a period of 30.205 years, upon the assumption, in such calculations, that money was worth four per cent per annum. To such aggregate of present worths, viz, $74,178.68, there was added the specific legacy valued at $500.00, making a total of $74,678.68. Upon this sum the alleged tax was imposed at the rate of $7.50 upon each one hundred dollars, making a tax of $5,600.90. In arriving at said total of $74,678.68 the sum of $74,178.68, which, as shown above, was included therein, was regarded and treated by the said collector of internal revenue in exactly the same manner had said sum consisted of an absolute cash bequest of that amount payable immediately to the said Mary Wadleigh Stokes.

IX.

Mary Wadleigh Stokes is still alive and your petitioner, as executor and trustee, as aforesaid, actually paid to her, in income on account of her interest, as aforesaid, the sum of $17,027.59 prior to
12 July 1, 1902; said sum represented the full amount of income to which she was entitled up to and including the 1st day of July, 1902. Your petitioner also delivered to the said Mary Wadleigh Stokes prior to July 1, 1902, the specific legacy named in the twelfth

paragraph of the last will and testament of the said Walter H. Tilden, and valued at $500, as hereinbefore set forth. That, therefore, the total amount to which Mary Wadleigh Stokes was entitled as beneficiary as aforesaid up to and including July 1, 1902, was the sum actually so received by her, viz, $17,527.59.

X.

On the 24th day of April, 1907, your petitioner duly filed an application, prepared in accordance with the regulations of the Secretary of the Treasury, made on the 15th day of July, 1902, with respect to refundments of moneys under the third section of the act of June 27, 1902, as above set forth, asking and demanding the refundment to it under the terms of the third section of the said act of June 27, 1902, of $5,600.90 paid as taxes as aforesaid or of such part of said sum as was paid as taxes upon income, which under the terms of said will had not been and could not have been paid to said Mary Wadleigh Stokes until subsequent to July 1, 1902.

The reasons and grounds set forth in said application are as follows:

"The act of June 27, 1902 (32 U. S. Stat. L., p. 406), directs the Secretary of the Treasury to refund all taxes collected upon contingent beneficial interests in legacies which were not absolutely vested in the possession and enjoyment of the legatees on or before July 1, 1902. Vanderbilt vs. Eidman, 196 U. S., 480, and Thatcher vs. United States, 149 Fed. Rep., 902.

"Mary Wadleigh Stokes was alive on July 1, 1902, and she
13 actually received in income from said estate prior to July 1, 1902, the sum of $17,027.59—this sum added to the specific legacy to her of $500 makes a total amount actually received by her prior to July 1, 1902, of $17,527.59, which at $7.50 per one hundred dollars makes a tax of $1,314.57, which deducted from $5,600.90 leaves a balance amounting to $4,286.33, being the excess in taxes illegally and unlawfully collected from this estate. Such balance should be refunded under said act as interpreted by the courts in the above cases of Vanderbilt vs. Eidman and Thatcher vs. United States, and also under the cases of Union Trust Co. vs. Lynch, 148 Fed. Rep., 49; Disston vs. McClain, 147 Fed. Rep., 114; and United States vs. Marion Trust Co., 143 Fed. Rep., 301, affirmed by the U. S. Supreme Court April 22, 1907.

"That the last will and testament of the said decedent has been duly admitted to probate and record, and that the personal property belonging to said decedent at the time of his decease passed in accordance with the terms of said last will and testament; that none of the trust estates provided for under the will terminated in whole or in part prior to July 1, 1902; and that none of the future beneficial interests vested in possession or enjoyment in whole or in part prior thereto.

"That the Fidelity Trust Company is the identical corporation as the Fidelity Insurance, Trust, & Safe Deposit Company, its name having been duly and lawfully so changed.

"Certified copy of the will, copy of legacy return with attached 'Exhibit A,' original receipt on Form 1, dated August 16, 1900, and power of attorney empowering and authorizing McGowan, Serven & Mohun to represent said estate before the departments and elsewhere, all attached hereto and made a part hereof."

Petitioner's application, as aforesaid, was accompanied by each and all of the papers and documents therein referred to and by all necessary evidence and proof of facts. Said application was in all
14 respects in accordance with the requirements of the third section of the said act of June 27, 1902, and the regulations in regard thereto. The facts as alleged in said application were not traversed or denied by the Secretary of the Treasury or by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless, on the 9th day of May, 1907, the Secretary of the Treasury rejected and denied said application, and he has continuously declined and still declines and refuses to pay to your petitioner the moneys asked and demanded in its application as aforesaid.

XI.

Your petitioner filed its original petition in this case on the 4th day of June, 1907, and its first amended petition on February 11, 1910, and the reasons why it has taken no action herein during the interval between June 4, 1907, and February 11, 1910, are as follows:

Prior to the filing of its original petition herein petitioner had duly presented various applications which were then and are now pending in the Treasury Department without action having been taken thereon by that department; said applications are for the refundment of moneys by the Secretary of the Treasury under the terms of and directions contained in the 3d section of the act approved June 27, 1902, as hereinbefore set forth, which moneys had been paid by your petitioner as executor, or trustee, or both, under the wills of various testators, as legacy taxes upon the alleged estimated and calculated present worths of incomes during lives or during definite periods of years.

By the institution of this suit petitioner not only sought to obtain the refundment to it as executor and trustee under the will of Walter H. Tilden of the moneys to which it is, as advised by counsel,
15 entitled, as hereinbefore set forth, under the act of June 27, 1902, but petitioner also sought by this suit to establish by a decision of this honorable court, or by the honorable the Supreme Court of the United States, an interpretation of the 3d section of the act of June 27, 1902, as aforesaid, in accordance with its contentions, which decision would be promptly acquiesced in by the Secretary of the Treasury in accordance with the established custom of the Treasury Department in analogous cases. Such a decision and acquiescence would result in petitioner receiving without litigation a refundment of moneys upon its various other applications above referred to and now pending in the Treasury Department.

Immediately after the filing of your petitioner's original petition herein, its counsel conferred with the then Assistant Attorney-General, charged with the defense of cases in this honorable court, and fully acquainted him with the purposes and objects of petitioner in instituting this suit as above set forth. Under date of June 25, 1907, petitioner's counsel in writing requested the aforesaid Assistant Attorney-General to co-operate with them in securing an early determination of this case by this honorable court. On June 27, 1907, petitioner's counsel received a reply to the aforesaid request as follows:

DEPARTMENT OF JUSTICE, *June 26, 1907.*

Messrs. McGOWAN, SERVEN & MOHUN,
1419 F street NW., Washington, D. C.

DEAR SIRS: In reply to your favor of the 25th instant, I would inform you that I have carefully examined the petition filed by you in the case of the Fidelity Trust Company, as executor and trustee under the will of Walter H. Tilden vs. United States, No. 30,020, and am satisfied that the questions involved are identical with those involved in the case of Disston vs. McClain (147 Fed. R.,
16 114), and I will, therefore, take no steps in your case until the Disston case has been decided by the Supreme Court.

Very respectfully,

J. A. VAN ORSDEL,
Assistant Attorney-General.

The case of Disston vs. McClain referred to in the above letter involved the refundment of moneys collected as taxes upon the calculated and estimated present worth of a definite annuity which was to endure during the life of the beneficiary, the court having held such moneys refundable. On October 21, 1907, the Supreme Court of the United States denied the application made on behalf of the collector for writ of certiorari in the case of Disston vs. McClain, and very shortly thereafter the Secretary of the Treasury began the refundment under the third section of the act of June 27, 1902, as aforesaid, of all moneys collected as taxes upon estimated and calculated present worths of definite annuities, to the extent that such sums had been so collected upon payments to be made the annuitants subsequent to July 1, 1902, the date when the repeal of the taxing law took effect; and the Secretary of the Treasury has ever since and will now, without regard to lapse of time, upon due application being made therefor, so refund all such moneys. Immediately after the denial of the application for writ of certiorari in the case of Disston vs. McClain, as aforesaid, your petitioner's attorneys called such fact to the attention of the said Assistant Attorney-General and were informed by him that in spite of his statements in the letter to petitioner's attorneys above set forth, his department had concluded to await the determination of the case of Lynch vs. Union Trust Company (164 Fed. Rep., 161), then pending on appeal before the Circuit Court of Appeals for the Ninth Circuit. That court, on

17 October 5, 1908, held that the moneys collected as taxes upon the calculated and estimated present worth of an income for years were refundable, and the only sums taxable were those which were actually received in the possession and enjoyment of the beneficiary prior to the repeal of the taxing law on July 1, 1902.

Under date of October 30, 1908, the Attorney-General, in response to a letter dated October 14, 1908, from the Secretary of the Treasury, advised the Secretary that no application would be made by the Department of Justice for a writ of certiorari in the case of Lynch vs. Union Trust Company, as aforesaid. Notwithstanding the letter, as aforesaid, from the Attorney-General, the Secretary of the Treasury declined to refund to your petitioner any of the moneys collected as taxes as aforesaid. After several conferences between your petitioner's counsel and the Attorney-General, who took office on March 4, 1909, said counsel on April 22, 1909, received a letter from the Attorney-General in which they were advised that the Attorney-General deemed it his duty to apply to the Supreme Court of the United States for a writ of certiorari in the said case of Lynch vs. Union Trust Company.

On May 3, 1909, application was duly made to the Supreme Court of the United States by the Solicitor-General of the United States on behalf of Lynch, the collector of internal revenue, in the case of Lynch vs. Union Trust Company, as aforesaid, for writ of certiorari, and such application was denied by said court on May 17, 1909. Under date of August 12, 1909, the Acting Attorney-General informed the Secretary of the Treasury in writing of the denial of the application made for writ of certiorari in the case of Lynch vs. Union Trust Company, of the acquiescence of the Department of Justice in the doctrine of said case, and further, in said letter

18 advised the Secretary of the Treasury that all applications for the fundment of moneys paid as taxes upon calculated and estimated present worths of incomes to endure during life or for years should be refunded by him under the act of June 27, 1902, as aforesaid to the extent that such moneys had been paid as taxes upon payments of incomes which were not due and payable until subsequent to July 1, 1902. After the receipt of the aforesaid letter by the Secretary of the Treasury, petitioner's counsel at the first opportunity afforded them, viz, on November 18, 1909, again presented their contentions to the Secretary of the Treasury that its applications for moneys, as aforesaid, should be promptly paid. On or about the 26th day of January, 1910, the Secretary of the Treasury informed petitioner's counsel that he had concluded not to follow the advice contained in the letter of the Acting Attorney-General of August 12, 1909, as aforesaid.

Your petitioner has refrained from proceeding with the prosecution of this case since filing its original petition herein with full reliance upon statements and assurances repeatedly made to its counsel by officials of the Treasury Department that the Secretary of the Treasury would promptly refund to it the moneys to which it is, as

advised by counsel, entitled, not only in the case but also on account of its various other applications hereinbefore mentioned, immediately upon the Secretary of the Treasury being notified that the Department of Justice had acquiesced in the doctrine of the said case of Lynch vs. Union Trust Co. The officials of the Treasury Department who made the statements as aforesaid to petitioner's counsel were those who had been duly charged by the Secretary of the Treasury with duty and authority in the premises.

Regardless of the matters and things as hereinbefore set
19 forth, the Secretary of the Treasury declines and refuses to make refundments to your petitioner upon any of its applications, as aforesaid.

No other action than that hereinbefore set forth has been had in this matter in Congress or in any of the departments.

XII.

Petitioner is advised by its counsel and therefore avers: That the third section of the act of Congress, approved on the 27th day of June, 1902, above set forth, directs the Secretary of the Treasury to refund all moneys collected as taxes upon contingent beneficial interests which were not absolutely vested in possession or enjoyment prior to the 1st day of July, 1902, the day on which the taxing law ceased to be in force; that the moneys paid by your petitioner as taxes upon the estimated and calculated present worth of the income to be received by said Mary Wadleigh Stokes quarterly during the estimated term of her natural life were collected upon contingent beneficial interests which had not absolutely vested in possession and enjoyment of the said Mary Wadleigh Stokes prior to July 1, 1902; that as Mary Wadleigh Stokes only actually received in possession and enjoyment prior to that date the sum of $17,527.59, as above set forth, it is the tax upon this sum alone which the United States is entitled to retain, and under the terms of the third section of the above act of Congress petitioner is entitled to have refunded to it as executor and trustee, as aforesaid, the moneys in excess thereof so collected and withheld; that the tax collected upon the calculated and estimated value to the said Mary Wadleigh Stokes of the income which it was estimated she would receive subsequent to the first day of July, 1902, was upon income which she could not receive under the terms of the will of the said Walter H.
20 Tilden until after the repeal of the taxing law; that each payment of such income was separately conditioned upon said Mary Wadleigh Stokes being alive on each date of payment, and that the Secretary of the Treasury is directed to refund such sums by the third section of the act approved June 27, 1902, as above set forth; that as the amount actually received by said Mary Wadleigh Stokes as beneficiary as aforesaid, viz, $17,527.59, at $7.50 per one hundred dollars, makes a tax of $1,314.59, which deducted from the amount of tax actually collected, viz, $5,600.90, leaves a balance amounting to $4,286.31, this is the amount illegally and un-

lawfully withheld from the petitioner, and directed to be refunded by the third section of said act, approved June 27, 1902; and that the refusal of the Secretary of the Treasury to refund the said sum is contrary to the terms of and directions contained in said section of said act of June 27, 1902.

Your petitioner is further advised by its counsel and, therefore, avers that the arbitrary assumption of a rate of interest by officials of the Treasury Department and use thereof in the preparation of the mortuary or annuity tables, as aforesaid, and the use of said tables in calculating the alleged present worth of the interest for life of the said Mary Wadleigh Stokes, was an assumption of legislative power by said officials which was violative of the Constitution of the United States.

XIII.

By proceedings duly had and approved by the governor of the Commonwealth of Pennsylvania on the 17th day of July, 1901, the name of your petitioner was duly and lawfully changed from the Fidelity Insurance, Trust, and Safe Deposit Company to the name, style, and title of Fidelity Trust Company, as will more fully and at large appear by reference to a certificate duly signed by the
21 Secretary of the Commonwealth of Pennsylvania, bearing date the 22d of October, 1906, filed with the original petition herein, marked "Claimant's Exhibit D," and prayed to be read and considered as a part of this second amended petition.

XIV.

Your petitioner avers there is justly due and owing to it, as executor and trustee under the last will and testament of Walter H. Tilden, from the United States, on account of the matters herein set forth, the sum of $4,286.31, after deducting all just set-offs and demands on the part of the United States, and that said estate is the sole owner of the claim herein sued upon, no assignment or transfer of the claim or any part thereof or any interest therein having been made.

Wherefore, your petitioner prays judgment against the United States for four thousand two hundred and eighty-six dollars and thirty-one cents ($4,286.31).

FIDELITY TRUST COMPANY,
Executor and Trustee under the last Will and Testament of Walter H. Tilden.
By McGOWAN, SERVEN & MOHUN,
Attorneys of Record.

DISTRICT OF COLUMBIA *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, Barry Mohun, who being duly sworn according to law, deposes and says that he is a member of the firm of McGowan, Serven & Mohun, which is duly authorized and empowered to make oath by a power of attorney duly executed by the executor of the last will and testament of Walter H. Tilden, deceased, that he has

22 read and understands the foregoing second amended petition, and that the matters and *and* facts therein set forth are true in substance and in fact, as he is informed and believes.

Subscribed and sworn to before me this 12th day of February, 1910.

[NOTARIAL SEAL.] MYDDELTON WOODVILLE,
Notary Public, District of Columbia.

23 CLAIMANT'S EXHIBIT "E."

TABLES.

Table, single-life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest, with explanatory notes and examples.

[United States Internal-Revenue Adjustment, 1898.]

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
0	23.179	$14.72829	$0.39507
1	30.552	17.30771	0.29586
2	35.626	18.69578	0.24247
3	37.572	19.15901	0.22465
4	38.702	19.41226	0.21491
5	39.352	19.55301	0.20950
6	39.654	19.61731	0.20703
7	39.691	19.62502	0.20673
8	39.625	19.61097	0.20727
9	39.264	19.53413	0.21022
10	38.891	19.45359	0.21332
11	38.507	19.36943	0.21656
12	38.113	19.28184	0.21993
13	37.710	19.19065	0.22344
14	37.298	19.09590	0.22708
15	36.877	18.99764	0.23086
16	36.447	18.89569	0.23478
17	36.010	18.79010	0.23884
18	35.565	18.68070	0.24305
19	35.113	18.56751	0.24740
20	34.652	18.45038	0.25191
21	34.186	18.32932	0.25656
22	33.711	18.20416	0.26138
23	33.230	18.07471	0.26636
24	32.742	17.94097	0.27150
25	32.248	17.80274	0.27682
26	31.747	17.65984	0.28231
27	31.239	17.51224	0.28799
28	30.725	17.35968	0.29386
29	30.205	17.20225	0.29991
30	29.678	17.03961	0.30617
31	29.147	16.87176	0.31262
32	28.608	16.69846	0.31929
33	28.067	16.51964	0.32617
34	27.516	16.33503	0.33327
35	26.961	16.14437	0.34060
36	26.401	15.94755	0.34817
37	25.834	15.74427	0.35599
38	25.263	15.53421	0.36407

24 CLAIMANT'S EXHIBIT "E"—Continued.

Table, single life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest—Continued.

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
39	24.685	$15.31722	$0.37241
40	24.101	15.09295	0.38104
41	23.511	14.86102	0.38996
42	22.915	14.62122	0.39918
43	22.313	14.37356	0.40871
44	21.708	14.11860	0.41852
45	21.103	13.85713	0.42857
46	20.499	13.58958	0.43886
47	19.896	13.31698	0.44935
48	19.298	13.03942	0.46002
49	18.703	12.75716	0.47088
50	18.113	12.47032	0.48191
51	17.527	12.17919	0.49311
52	16.947	11.88408	0.50446
53	16.372	11.58531	0.51595
54	15.804	11.28325	0.52757
55	15.243	10.99789	0.53931
56	14.689	10.66982	0.55116
57	14.143	10.35931	0.56310
58	13.603	10.04630	0.57514
59	13.072	9.73131	0.58726
60	12.549	9.41474	0.59943
61	12.029	9.09765	0.61163
62	11.532	8.78052	0.62382
63	11.039	8.46412	0.63600
64	10.557	8.14888	0.64812
65	10.088	7.83552	0.66017
66	9.630	7.52476	0.67212
67	9.185	7.21699	0.68396
68	8.753	6.91298	0.69565
69	8.333	6.61301	0.70719
70	7.926	6.31716	0.71857
71	7.532	6.02612	0.72976
72	7.151	5.74003	0.74077
73	6.782	5.45928	0.75157
74	6.425	5.18402	0.76215
75	6.081	4.91463	0.77251
76	5.749	4.65125	0.78264
77	5.428	4.39383	0.79254
78	5.119	4.14286	0.80220
79	4.823	3.89858	0.81159
80	4.537	3.66071	0.82074
81	4.262	3.42900	0.82965
82	3.995	3.20258	0.83836
83	3.737	2.98024	0.84601
84	3.484	2.76106	0.85534
85	3.236	2.54366	0.86371
86	2.992	2.32795	0.87200
87	2.752	2.11384	0.88024
88	2.517	1.90115	0.88842
89	2.286	1.69107	0.89650
90	2.062	1.48540	0.90441
91	1.845	1.28432	0.91214
92	1.637	1.09024	0.91961

25 CLAIMANT'S EXHIBIT "E"—Continued.

Table, single life, 4 per cent, showing the present worth of an annuity, or life interest, and of a reversionary interest—Continued.

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
93	1.442	$0.90647	$0.92667
94	1.263	0.73687	0.93320
95	1.103	0.58435	0.93906
96	0.975	0.46182	0.94378
97	0.877	0.36698	0.94742
98	0.746	0.24038	0.95229
99	0.500	0.00000	0.96154

EXAMPLE 1.

A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

EXAMPLE 2.

A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000. The present value of the sum of $1, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

The reversion or present value of $1, due at the end of the year of death of a person aged thirty-five years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

NOTE.—The foregoing table is based on the "actuaries' or combined experience table," money being worth 4 per cent per annum.

The first column shows the age of the person under consideration.

The second column shows the corresponding "mean redemption period" and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present value of annuities and reversions contingent on the duration of life.

The "mean redemption period" is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

26 CLAIMANT'S EXHIBIT "E"—Continued.

TABLES—continued.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years. Annuity.	Present worth of one dollar, payable at the end of a certain number of years. Reversion.
1	$0. 96154	$0. 961538
2	1. 88609	0. 924556
3	2. 77509	0. 888996
4	3. 62989	0. 854804
5	4. 45182	0. 821927
6	5. 24214	0. 790314
7	6. 00205	0. 759918
8	6. 73274	0. 730690
9	7. 43533	0. 702587
10	8. 11089	0. 675564
11	8. 76047	0. 649581
12	9. 38507	0. 624597
13	9. 98565	0. 600574
14	10. 56312	0. 577475
15	11. 11839	0. 555265
16	11. 65229	0. 533908
17	12. 16567	0. 513373
18	12. 65929	0. 493628
19	13. 13394	0. 474642
20	13. 59032	0. 456387
21	14. 02916	0. 438834
22	14. 45111	0. 421955
23	14. 85684	0. 405726
24	15. 24696	0. 390121
25	15. 62208	0. 375117
26	15. 98277	0. 360689
27	16. 32958	0. 346816
28	16. 66306	0. 333477
29	16. 93371	0. 320651
30	17. 29203	0. 308319

EXAMPLE.

A man dies leaving personal property to the amount of $50,000. His daughter to have the income from it for 20 years, it then to revert to his youngest son. What is the present worth of these legacies? The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1 for 20 years. In the table opposite 20 we find the value of an annuity of $1 to be $13.59032. Therefore the present worth of an annuity of $2,000 will be $27,180.64.

A reversion of $1 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35.

27 II.—DEMURRER. FILED FEBRUARY 16, 1910.

And now come the said defendants, by their Attorney-General, and demurring to the petition and amended petitions in this cause, state as the ground thereof that, the cause of action having arisen out of the administration of the internal-revenue laws of the United States, this court is without jurisdiction to consider the subject-matter of the said petitions.

And the said defendants, by their Attorney-General, further demurring to the said petitions, state as the ground thereof that section 3 of the refunding act of June 27, 1902 (32 Stat., 406), conferred on the Secretary of the Treasury exclusive jurisdiction to decide all matters of fact and law arising out of claims filed under said act.

And the said defendants, by their Attorney-General, further demurring to the said petitions, state as the ground thereof that the facts alleged therein do not constitute a cause of action.

JOHN Q. THOMPSON,
Assistant Attorney-General.

III.—ARGUMENT AND SUBMISSION ON DEMURRER.

On the 7th day of March, 1910, the demurrer to claimant's petition was argued by Mr. George M. Anderson and Mr. Ellis J. Johnson; Mr. Paul Fuller and Mr. Barry Mohun were heard in opposition. On the 8th day of March, 1910, Mr. Fuller was further heard in opposition, Mr. Anderson and Mr. Johnson were further heard for the demurrer, and the demurrer was submitted.

28 IV.—OPINION OF COURT ON DEMURRER. FILED MAY 2, 1910.

BARNEY, J., delivered the opinion of the court.

This suit is brought for the recovery, under the act of June 27, 1902 (32 Stat., 406), of the sum of $4,286.31, collected by the United States as an inheritance tax under the provisions of sections 29 and 30

of the act of June 13, 1898, commonly known as the Spanish war revenue law (30 Stat., 466), upon the residuary estate bequeathed by the will of the late Walter H. Tilden to Mary Wadleigh Stokes for life. The defendants have demurred to the petition, and this demurrer is before us for decision.

The provisions of the Spanish war revenue law, so far as they affect this case, are as follows:

"SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be: * * *."

This is followed by specific provisions graduating the tax upon legacies and distributive shares.

By the act of April 12, 1902, some of the provisions of the act of June 13, 1898, supra, were amended and some were repealed.

29 Section 29, providing for the collection of inheritance taxes, was not repealed as to estates vesting in possession or enjoyment prior to July 1, 1902, for twenty years, but it was provided:

"That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereto, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows."

The above section was repealed to take effect on July 1, 1902, by an act approved April 12, 1902 (32 Stat., 96).

This suit is directly predicated upon the act of June 27, 1902 (32 Stat., 406), the third section of which is as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropri-

ated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The facts relating to the inheritance involved in this suit are as follows:

Walter H. Tilden, of Philadelphia, died in March, 1899, and named the claimant as the sole executor and trustee of his will. By his will it is provided inter alia that Mary Wadleigh Stokes should enjoy during her natural life the income from his residuary estate, such income to be paid to her quarterly. The residuary personal estate thus bequeathed amounted to $120,303.94. Mary Wadleigh Stokes actually received as income up to July 1, 1902, the date of the repeal of the taxing law, the sum of $17,027.59, and in addition thereto a specific legacy of silver plate, etc., valued at $500, making a total of $17,527.59. The tax was assessed and collected upon the sum of $74,678.68 exactly in the same manner as if the interest of Mary Wadleigh Stokes in the estate consisted of an absolute cash bequest of that amount payable immediately to her. This sum of $74,678.68 was arrived at by the use of certain mortuary tables or a series of estimates of the average expectancy of life of individuals of various ages. These tables also purported to show the present value, to persons of various ages, of an annuity of $1 payable during life. In the prepartion of the tables 4 per cent per annum was assumed as the value of money.

It is claimed by the plaintiff that under the third section of the act of June 27, 1902, just quoted, it was only liable to pay a tax upon the income actually received by it from the life estate of Mary Wadleigh Stokes prior to the repeal of that law on July 1, 1902, together with the specific legacy mentioned of the value of $500. Hence it is also claimed by the plaintiff (though that fact is doubtless immaterial in the consideration of this case) that the tax, the refunding of which is sought in this case, was illegally exacted, and if a proper course had been pursued could have been recovered from the defendants without the assistance of the act of June 27, 1902. Such course, however, was not pursued, the right of recovery was lost, and it is now conceded by both parties that the plaintiff's right of recovery is dependent entirely upon the act last referred to.

It is contended by the defendants (1) that this court has no jurisdiction under the act of June 27, 1902; (2) that, conceding that it has jurisdiction, the claimant has no right of recovery under that act as disclosed by the allegations of the petition.

It is also contended by the defendants that this suit is barred by section 3228, Revised Statutes, because not presented to the Commis-

sioner of Internal Revenue within two years from the passage of the refunding act. This contention seems to follow as a corollary from the denial of jurisdiction, and the two propositions will be discussed together.

I. The defendants argue that section 3 of the act of June 27, 1902, above quoted, confers exclusive jurisdiction on the Secretary of the Treasury to determine who are entitled to its benefits, and that his decision upon that question is final; that that section confers upon the Secretary of the Treasury judicial functions in the determination of facts and the law applicable to the same, and that such determination is not subject to review by the courts. It is also argued by the defendants that this suit has relation to the revenue system of the United States, and hence is to be governed by some of the principles which have been established regarding the refunding of taxes under that system. The several statutes relating to that subject and numerous decisions under them have been cited to sustain that contention. As it appears to us, the remedy given by Congress in this case has no relation whatever to the revenue system so far as the question of jurisdiction or method of procedure is concerned. True, the money which is directed to be refunded was illegally collected under the revenue system, and the refunding act provides that application for the same must be made to the Commissioner of Internal Revenue; but as the tax was paid voluntarily its legality or illegality does not enter into the case. Reduced to its lowest terms, the act simply directs the Secretary of the Treasury to pay definite sums of money to certain persons therein described. As, we think, was very properly said by the Attorney-General in an opinion relating to the construction of this statute:

"The provisions of this statute are special and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S., sec. 3228.) Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs." (26 Op. Atty. Gen., 195, 197.)

31 ~~this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs." (26 Op. Atty. Gen., 195, 197.)~~

We do not think it can properly be said that this suit arises under the revenue laws at all. It arises under a statute for the refunding of taxes illegally collected under the revenue laws, and the procedure and rules governing it are no different than they would be if the money had reached the Treasury in any other manner. It follows from the foregoing that, in the opinion of the court, this suit is not barred by any statute of limitations.

The question as to when a statute confers merely ministerial duties upon an executive officer which are subject to the control of the courts, and when its execution involves judicial functions and discre-

tionary powers, has often been before the courts. While it may appear that the decisions upon this subject are not entirely harmonious, yet the same general principle is recognized in all of them, and this seeming lack of harmony arises from the great diversity of statutes which have been under consideration in these cases. The general principle governing this class of cases is well stated by Taney, Ch. J., in Decatur v. Paulding (14 Pet., 497, 515), as follows:

"The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his duties."

Also, by Mr. Justice Bradley, in United States ex rel. Dunlap v. Black (128 U. S., 40, 48), where it was said:

"The court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them."

The case of Medbury v. United States (173 U. S., 492) was much like the one at bar, arising under a statute requiring the Secretary of the Interior to repay to certain entrymen or their heirs and assigns fees in cases where entries were not confirmed. Suit was brought in this court and dismissed for want of jurisdiction. In reversing this court Mr. Justice Peckham, speaking for the court, said:

"But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the Court of Claims has jurisdiction of such a case." (Id., 498.)

The case of Thacher v. United States (149 Fed. Rep., 902) arose in the United States Circuit Court for the District of Massachusetts, and, as in the case at bar, was brought under the act of June 27, 1902. A demurrer was interposed, but was overruled, and the
32 suit[A] act of June 27, 1902, the Secretary of the Treasury went to judgment. The question of jurisdiction does not appear to have been raised in the case, but that fact only indicates that the court and counsel did not consider that there was any such question in the case. The counsel for the defendants contends that by the tified, to pay them the sum to which under the law they are entitled. It may require some knowledge of the law to determine that fact, but none the less the ultimate determination is a fact. In the Medbury case, supra, the Secretary of the Interior had to know the law of descent in the States where the entrymen lived, and may have

died, in order to identify the parties entitled to a refund, just as the Secretary of the Treasury in this case must know what taxes have been "collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902," in order to determine who are entitled to a refunding of the same. When this identity is determined there is no discretion to be exercised. In short, the act of June 27, 1902, is an appropriation to a certain class of persons to be paid by the Secretary of the Treasury, when identified by him. The fact that this identification requires some knowledge of law does not change the character of his duties. This claim rests solely upon the provisions of the act of June 27, 1902, and we think is clearly within the jurisdiction of this court by the act of March 3, 1887 (24 Stat., 505).

II. We come now to the question whether the facts alleged in the petition constitute a cause of action against the defendants.

The act of June 27, 1902, was before the Supreme Court in the case of Vanderbilt v. Eidman (196 U. S., 480), and it was there held that the two clauses of section 3 were to be construed together; that is to say, that the taxes which, by the first clause, are directed to be refunded are the same as those which are thereafter in the second clause forbidden to be collected. It is thus settled that the taxes to be refunded are such as have been collected on "contingent beneficial interests not absolutely vested in possession or enjoyment" prior to July 1, 1902.

The seventeenth clause of Cornelius Vanderbilt's will devised the residue of his estate to his executors, in trust, to collect the income and apply so much of the same as might be, in their judgment, advisable for the support, maintenance, and education of his son Alfred G., to accumulate any surplus income, to be paid to him when he arrived at the age of 21 years; and thereafter to pay the net income of his estate to him as received, until he arrived at the age of 30 years, when he was to be put in full possession of one-half of said estate to be set apart for that purpose by the executors and trustees; and upon the further trust, thereafter to pay to the said Alfred G. the income from the balance of said estate until he should arrive at the age of 35 years, when he was to be put in possession of the balance of said estate. The right of Alfred G. to the beneficial enjoyment, as provided in the will, until he became 30 years of age, was appraised at $5,119,612.43, and upon this sum the executors paid a death duty under sections 29 and 30 of the act of June 13, ~~1898~~, supra, at the rate of 2¼ per cent, the tax amounting to $115,191.28. After payment of this amount without protest and subsequent to the passage on March 2, 1901 (31 Stat., 938), of an amendment to the act of June 13, ~~1898~~, the Commissioner of Internal Revenue, considering that by that enactment Alfred G. had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of 30 and 35 years, re-

33 spec- ~~on March 2, 1901 (31 Stat., 938), of an amendment to the act of June 13, 1898, the Commissioner of Internal Revenue,~~

~~considering that by that enactment Alfred G. had become immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of 30 and 35 years, respec~~tively, assessed a death duty based upon that hypothesis. In making this assessment, as by the mortuary tables it was shown that Alfred G. had a life expectancy of more than 35 years, the commissioner assessed the interest as a vested estate equal in value to the sum of the entire residuary estate, viz, $18,972,117.46, and upon this valuation a tax was levied producing $426,872.64. This sum, less the tax previously paid, was paid by the executors under protest, and the suit under consideration was to secure the refunding of that sum from the Government. The question of the legality of the tax levied on the appraisement of Alfred G. Vanderbilt's right to the beneficial enjoyment of the income of the residuary estate until he was 30 years of age was not before the court for decision. Four questions were certified by the Circuit Court of Appeals to the Supreme Court for answers, only one of which, the third, was answered. That question was as follows, and was answered in the negative:

"Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of 30 years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

While, therefore, the able opinion of Mr. Justice White in that case does not directly decide the particular point in question in the case at bar, we think its reasoning does so by implication. Without attempting a complete analysis of the opinion, it appears to us to distinctly decide that the war revenue act (act of June 13, 1898, supra) did not impose duties upon legacies which were vested merely within the technical meaning of that term, but only upon legacies which were vested in actual possession and enjoyment; and that by the terms of that statute and its amendments the turning over of such legacy to the beneficiary and the payment of the tax were intended to be contemporaneous.

The case of Disston v. McClain (147 Fed. Rep., 114) was a suit to recover from an internal-revenue collector a tax which had been paid under protest upon a legacy under the same act. The legacy was an annuity of $15,000, payable quarterly during the life of the legatee. The circuit court held that this bequest was in effect a legacy of a life estate in the present value of so much of the personal property of the testator as would be necessary to produce an annuity of $15,000, and that said estate vested in possession or enjoyment upon the death of the testator. The Circuit Court of Appeals reversed the lower court, holding that the provision in the will in favor of the legatee "was a series of legacies and bequests vesting in possession or enjoyment at

stated intervals, but each contingent before vesting on the legatee's being alive when it became due," and decided that the war revenue act imposed no tax on the interest of the legatee other than on the specific payments of the annuity bequeathed to her as the same should from time to time fall due. On October 21, 1907, the Supreme Court denied the petition of the defendants for a writ of certiorari in this case. (207 U. S., 587.)

five children, and directed the trustees to pay the net income of said estate in equal shares to his said children until they each should reach certain ages therein specified. The periods that were to elapse before each child was to receive his proportional share of the estate were not the same, so that their several life estates were of different values. The testator died May 31, 1900, and the final decree distributing the estate was entered June 26, 1901. The Commissioner of Internal Revenue determined the then present value of the whole estate to each of the heirs as an annuity until they should arrive at the ages specified in the will, made an estimate of the value of each one of these interests as of the date of June 26, 1901, as an annuity to each, and made the assessment accordingly. Two subsequent assessments upon the estate were made, one based on the total amount that would ultimately be distributed to the legatees, and the other based upon the value of the entire corpus of the estate as it then stood. The total amount of all three assessments was $11,375.93, which was paid by the executors of the estate under protest. The suit was against the collector of internal revenue to recover this sum, claiming that it had been illegally assessed and collected. The defendant entered a demurrer to the complaint which was overruled by the court, and it was decided that where the children and legatees of a testator were to receive only the income from their respective shares in the estate until they reached stated ages, which did not occur in any case until after July 1, 1902, when the repeal of section 29 of the war-revenue act took effect, under the act of June 27, 1902, supra, such life estate was not an interest liable to taxation as such, and that any such tax previously collected should be refunded; and that the interest of such legatees for the purposes of taxation was the value of the income received by each, respectively, from the estate prior to July 1, 1902, and which was subject to a tax only in case it amounted to $10,000. The case was affirmed by the Circuit Court of Appeals (164 Fed. Rep., 161), and on May 17, 1909, the Supreme Court denied the application of the defendants for a writ of certiorari (214 U. S., 523).

The court in the case of Disston v. McClain, supra, while it said that it was "inclined to think" that the reasoning of the court in the Vanderbilt case would exclude from taxation under the war-revenue law the interest of Alfred G. in the residuary personal estate, the income of which he was to enjoy, attempts to make a distinction under that law between a legacy of an annuity to be paid out of an estate, and a legacy of the net income

of an estate, and the same contention is made by the defendants in the case at bar. When we remember, as is well stated by the court in Disston v. McClain (pp. 116, 117), that it is a "canon of construction of universal acceptance in American and English jurisprudence, that no tax burden is held to be laid on citizen or subject, unless the legislative intention to so impose it is expressed in clear and unequivocal language, and that in cases of doubt, statutes imposing taxes are construed most strongly against the Government," it does not seem proper that any such technical distinction should be made. Whether the bequest is an annuity of a certain sum to be paid out of an estate, or of a life interest in a personal estate which will yield the same sum, practically the interest vested "in possession or enjoyment" is the same. The language of the court in Vanderbilt v. Eidman, supra (p. 495), would seem to negative any such distinction. It was there said:

35 ~~doubt, statutes imposing taxes are construed most strongly against the Government," it does not seem proper that any such technical distinction should be made. Whether the bequest is an annuity of a certain sum to be paid out of an estate, or of a life interest in a personal~~

"In view of the express provisions of the statute [war revenue act] as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."

The questions presented to the court in this case were very interesting as well as important, and many authorities bearing incidentally upon them have been called to our attention. They have all been carefully examined, but a further review of cases would serve no good purpose at this time. The cases above discussed are believed to be decisive of the case at bar. Therefore, both upon legal principles governing the construction of statutes, as well as authority, if the allegations of the petition are sustained, we believe the plaintiff is entitled to recover the judgment prayed for, and the demurrer is overruled.

Howry, J., was not present at the trial of this case and took no part in its decision.

V.—ORDER OVERRULING DEMURRER. FILED MAY 2, 1910.

At a Court of Claims held in the city of Washington on the 2nd day of May, A. D. 1910, it was ordered that the defendants' demurrer be overruled.

BY THE COURT.

36 VI.—TRAVERSE. FILED MAY 5, 1910.

In the Court of Claims of the United States. December term, A. D. 1909.

FIDELITY TRUST COMPANY, FORMERLY THE FIDELITY Insurance, Trust, and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased, *vs.* THE UNITED STATES.	No. 30020.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

VII.—SUBMISSION OF CASE ON MERITS.

On the 9th day of May, A. D. 1910, this case was submitted on the merits by Messrs. McGowan, Serven & Mohun, for the claimant, and Messrs. George M. Anderson and Ellis C. Johnson, for the defendants.

37 VIII.—FINDINGS OF FACT AND CONCLUSION OF LAW, FILED MAY 11, 1910.

FIDELITY TRUST COMPANY, FORMERLY THE FIDELITY Insurance, Trust and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased. *v.* THE UNITED STATES.	No. 30020.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Claimant is a corporation duly organized and incorporated under the laws of the Commonwealth of Pennsylvania, and by its charter is authorized inter alia to act as executor, administrator, or trustee of the estates of deceased persons.

II.

Heretofore, to-wit, on the 13th day of July, 1895, Walter H. Tilden, then in life, and being a citizen of the United States and a resident of the city of Philadelphia, Commonwealth of Pennsylvania, duly executed and acknowledged his last will and testament, which will provide inter alia as follows:

"Twelfth. I give and bequeath to Mary Wadleigh Stokes, a niece and namesake of my deceased wife, all my silver plate, cut glassware, pictures, books, and ornaments of every description contained in my dwelling house, No. 1636 Green street, Philadelphia, and also the free use and occupancy of said house and all the furniture and utensils therein, so long as she may wish to reside therein. It is my will that no inventory or appraisement be filed or account be taken of the articles contained in my said dwelling house.

"Fifteenth. I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real and personal, unto The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, its successors and assigns, in trust, to hold the same, either as at present invested, or in such securities as to my said
38 trustee may be deemed safe, and to collect and receive the rents, interest, dividends, and income therefrom, and pay the same over, less all proper charges thereon, to the said Mary Wadleigh Stokes, in quarterly payments, during all the period of her natural life, and in case her mother, Frances Wadleigh Stokes, should survive her daughter, then the said The Fidelity Insurance, Trust and Safe Deposit Company, trustee, shall pay to her one thousand dollars per annum, in quarterly payments of two hundred and fifty dollars ($250.00) each, during all the period of her natural life, and the said The Fidelity Insurance, Trust and Safe Deposit Company shall, after the decease of the said Mary Wadleigh Stokes and her mother, hold what remains of the principal of my residuary estate and property upon the further trust to grant, convey, assign, and transfer the same to the Home for Aged Couples of the City of Philadelphia, provided, however, that the said home shall by legal process have its corporate title and name changed to that of the Tilden Home for Aged Couples of the City of Philadelphia; but in case the said Home for Aged Couples of the City of Philadelphia should be unable or unwilling to accept the devise and bequest aforesaid made to it under the condition above named, then and in that case the said The Fidelity Insurance, Trust and Safe Deposit Company shall convert my residuary property and estate aforesaid into money, and divide the same according to its best judgment, and in such sums as it may deem best, among the most worthy charitable institutions of the city of Philadelphia, without regard to denominational or sectarian affiliation or connection, except that among the institutions intended in such case as above recited to be so benefited shall be the Hospital of the Protestant Episcopal Church of Phila-

delphia, Christ Church Hospital of Philadelphia, and also the before named Home for Aged Couples of the City of Philadelphia.

"Sixteenth. I hereby constitute and appoint The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia to be the executor of this my last will and testament, and I direct that the commissions chargeable by my said executor and trustee shall be at the rate of three per cent upon the capital and income of said estate and no more."

Claimant is the identical corporation as The Fidelity Insurance, Trust and Safe Deposit Company named as executor and trustee in the above will, its name having been duly changed to Fidelity Trust Company.

On the 2d day of July, 1896, the said Walter H. Tilden, then in life, and being a citizen and resident as aforesaid, duly executed and acknowledged a codicil to the above-mentioned will, which codicil provided inter alia as follows:

39 "I, Walter H. Tilden, of the city of Philadelphia, make this codicil to my last will and testament, dated July 13, 1895.

"Whereas in the sixth paragraph of my will I have bequeathed to Elizabeth C. Tilden the mortgage of four thousand dollars upon her property on Fourth street, South Boston, Mass., and directed the cancellation thereof.

"And whereas the said Elizabeth C. Tilden has sold the said property since the making of my will, now I do revoke the bequest and direction with regard to the said mortgage in the said paragraph, and I do further direct that the trustees of my residuary estate shall, out of the income thereof, during the continuance of the trust provided for in the 15th item of my said will, pay to the said Elizabeth C. Tilden the sum of five hundred dollars annually in quarterly payments, and upon her death, during the continuance of the said trust, out of the income thereof to pay the said amount to her two daughters Adeline and Ella, or the survivor of them, and upon the death of the survivor of said annuitants, the said annuity shall go as is directed for the rest of the income of my residuary estate. All the annuities directed in my said will and codicil shall run from the date of my death and shall be free of collateral inheritance tax. In all other respects I confirm my will."

III.

The said Walter H. Tilden departed this life on the 16th day of March, 1899. Said last will and testament and codicil were never revoked or modified by said testator, and they were duly admitted to probate and record in the office of the register for the probate of wills and granting of letters of administration in and for the city and county of Philadelphia, as aforesaid, as the last will and testament and codicil of the said Walter H. Tilden. Elizabeth C. Tilden, a beneficiary named in said last will and testament and codicil, sur-

vived said testator, Walter H. Tilden, and is still alive. Claimant duly qualified as executor and trustee thereunder, and on the 29th day of March, 1899, letters testamentary on the estate of said Walter H. Tilden were duly granted to claimant. Claimant is still executor and trustee, as aforesaid, and its authority as such has never been revoked or modified. Claimant has fully complied with all the terms of and directions contained in said last will and testament and codicil.

40 IV.

Subsequent to the date of the death of said Walter H. Tilden, claimant was notified by the local collector of internal revenue for the first district of Pennsylvania, which district includes the city of Philadelphia, aforesaid, to make return to him of the legacies and bequests passing under the last will and testament of said Walter H. Tilden, deceased. Claimant made such return in writing on the 8th day of June, 1900, and thereafter, to wit, on the 16th day of August, 1900, paid to such collector, pursuant to his demand and assessment made, the sum of $5,600.90, being an alleged legacy tax upon the alleged then present worth of the income during life and upon a bequest valued at $500, both to Mary Wadleigh Stokes, a beneficiary named in said will as above set forth.

Said sum of $5,600.90 was duly turned over and delivered to the United States by said collector in the usual and ordinary course of the conduct of the duties of the said collector.

The legacy return made by petitioner, above referred to, set forth each of the legacies bequeathed by said testator. The portions thereof material to this case are as follows:

Names of persons entitled to beneficial interest in said property	Mary Wadleigh Stokes.
Age	29.
Relationship of beneficiary to person who died possessed	None.
Clear value of legacy	$74,678.68.
Amount taxable	$74,678.68.
Rate for every $100	$7.50.
Amount of tax	$5,600.90.
Remarks	Miss Stokes receives the income for life of the residuary estate, viz, $120,303.94, after payment of the above annuity, and also a specific legacy valued at $500. See Exhibit "A" attached for calculation.

There was attached to said legacy return a certain memorandum entitled "Exhibit A," being copy of calculations made by said collector of internal revenue, and which showed in part the manner in which said legacy tax of $5,600.90 was calculated. Such memorandum is in words and figures as follows:

41 EXHIBIT A.

Calculation showing how value of legacy to Mary Wadleigh Stokes is obtained.

Amount of residuary personal estate	$120,303.94
	.04
The income upon which at 4 % is	$4,812.1576
Deduct annuity of $500 payable to Elizabeth C. Tilden and after her death to her daughters Adeline and Ella	500.
	$4,312.15
Mary Wadleigh Stokes being 29 years old, the annuity value for that age taken from official table is 17.20225, which multiplied by 4312.15 is	$74,178.68
Add specific legacy	500.
Total clear value for legacies	74,678.68
The tax rate per hundred is	7.50
Amount of tax	$5,600.90

V.

The collector of internal revenue, as aforesaid, in accordance with instructions of the Commissioner of Internal Revenue, for the purpose of ascertaining the alleged present value of the income, payable quarterly, during life, to the said Mary Wadleigh Stokes, from the residuary estate of said Walter H. Tilden, used and adopted certain mortuary tables or a series of estimates of the average expectancy of life of individuals of different ages. Said tables also showed the alleged present value to persons of various ages of an annuity or life estate of one dollar. In the preparation of such tables the rate of four per centum per annum was the rate of interest arbitrarily assumed. By the use of said tables it was further assumed that the income from the above shown residuary estate would during each year of the natural life of the said Mary Wadleigh Stokes, equal exactly four per centum thereof, viz: $4,812.1576, from which was deducted the annuity of $500 payable to Elizabeth C. Tilden, and after her death to her daughters Adeline and Ella, leaving a supposed net annual income to the said Mary Wadleigh Stokes of $4,312.15. And it was also so assumed by the use of said tables that Mary Wadleigh Stokes would live 30.205 years. ~~Copy of said tables are filed here, with marked "Claimant's Exhibit B," and prayed to be read and considered as a part of this second amended petition.~~ With said assumed annual income ($4,312.15), the alleged present worth of such a sum payable annually during a period of years, equal to the supposed expectancy of life of the said Mary Wadleigh Stokes (30.205 years) was calculated to be $74,178.68. The said sum of $74,178.68 in the aforesaid calculation represents the total of the present worths of $4,312.15 to be paid each year for a period of 30.205 years, upon the assumption, in such calculations, that money was worth
42 four per cent per annum. To such aggregate of present

worths, viz: $74,178.68, there was added the specific legacy valued at $500.00, making a total of $74,678.68. Upon this sum the alleged tax was imposed at the rate of $7.50 upon each one hundred dollars, making a tax of $5,600.90. In arriving at said total of $74,678.68 the sum of $74,178.68, which as shown above was included therein, was regarded and treated by the said collector of internal revenue in exactly the same manner had said sum consisted of an absolute cash bequest of that amount payable immediately to the said Mary Wadleigh Stokes.

In the above process of calculations and estimates the officials of the Internal Revenue Bureau, by the use of 4 per centum as the value of money, reduced the expected income to be enjoyed by Mary Wadleigh Stokes to the basis of an annuity or a life estate, with the annual income of $4,312.15, and taxed the same as such.

VI.

Mary Wadleigh Stokes is still alive, and claimant, as executor and trustee, as aforesaid, actually paid to her in income on account of her interest, as aforesaid, the sum of $17,027.59 prior to July 1, 1902; said sum represented the full amount to which she was entitled as income up to and including the 1st day of July, 1902. Claimant also delivered to the said Mary Wadleigh Stokes prior to July 1, 1902, the specific legacy named in the twelfth paragraph of the last will and testament of the said Walter H. Tilden, and valued at $500, as hereinbefore set forth. That, therefore, the total amount to which Mary Wadleigh Stokes was entitled as beneficiary as aforesaid, up to and including July 1, 1902, was the sum actually so received by her, viz: $17,527.59.

The tax upon $17,527.59, at $7.50 per one hundred dollars, is $1,314.59, which, deducted from the amount of tax actually collected, viz, $5,600.90, leaves a balance amounting to $4,286.31, which is the amount of tax collected upon the estimated and calculated values of payments of income to said Mary Wadleigh Stokes, which she was not entitled to receive under the terms of the testator's will until subsequent to July 1, 1902.

43 VII.

On the 24th day of April, 1907, claimant filed an application, prepared in accordance with the regulations of the Secretary of the Treasury, made on the 15th day of July, 1902, with respect to refundments of moneys under the third section of the act of June 27, 1902, as above set forth, asking and demanding the refundment to it under the terms of the third section of the said act of June 27, 1902, of $5,600.90 paid as taxes as aforesaid, or of such part of said sum as was paid as taxes upon income, which under the terms of said will had not been and could not have been paid to said Mary Wadleigh Stokes until subsequent to July 1, 1902.

Claimant's application, as aforesaid, was accompanied by all necessary evidence and proof of facts. Said application was in all respects in accordance with the requirements of the third section of the said act of June 27, 1902, and the regulations in regard thereto. The facts as alleged in said application were not traversed or denied by the Secretary of the Treasury, or by any representative of the United States. Although said application was in all respects complete and in due form, nevertheless, on the 9th day of May, 1907, the Secretary of the Treasury rejected and denied said application, and he has continuously declined and still declines and refused to pay to claimant the moneys asked and demanded in its application as aforesaid, and notified the claimant's attorneys on May 11, 1907, of such rejection of the claim by the following letter:

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
TREASURY DEPARTMENT,
Washington, May 11, 1907.

Messrs. McGOWAN, SERVEN & MOHUN,
Glover Building, Washington, D. C.

GENTLEMEN: Your claim as attorneys for the executor of the estate of Walter H. Tilden, deceased, for the refunding of $5,600.90, tax paid on the legacies, has been examined and rejected on the ground that the tax was collected upon a life estate passing under the will of testator and vesting in the possession and enjoyment of the legatee prior to July 1, 1902, and that the tax having been paid August 16, 1900, and the claim not having been filed until April 24, 1907, allowance is barred by the two years' limitation imposed by section 3228, R. S.

The claim has been submitted to the Secretary of the Treasury for consideration and action, who approved the findings and rejected the claim on the 9th instant.

Respectfully,

ROB'T WILLIAMS, Jr.,
Acting Commissioner.

44 VIII.

The regulations put in force on July 15, 1902, by the Secretary of the Treasury, and which were in force when the application for the refund in this case was made, were as follows:

"Claims for refunding of taxes which have been collected on contingent beneficial interests, which did not become vested prior to July 1, 1902, shall be made on Form 46 and filed with the collector of internal revenue, who will receive all claims presented and forward same to the office of the Commissioner of Internal Revenue for consideration. Such claims will be considered and disposed of as claims for refunding under section 3220, Revised Statutes, are now disposed of. See Department Circular No. 86 (internal revenue, No. 630), as

modified by the opinion of the Attorney-General of August 1, 1902. * * *

"No claim or application hereafter filed for the refunding of taxes under section 3220 of the Revised Statutes, or section 6, act of March 1, 1879, as amended, will be entitled to consideration unless the same shall be filed within two years from the date of the payment of the tax."

CONCLUSION OF LAW.

Upon the foregoing findings of fact and according to the decision of this court upon the demurrer of the defendants to the petition of the claimant herein, the court decides, as a conclusion of law, that the claimant is entitled to judgment against the defendants in the sum of four thousand, two hundred and eighty-six dollars and thirty-one cents ($4,286.31).

BY THE COURT.

45 IX. JUDGMENT OF THE COURT, FILED MAY 11, 1910.

At a Court of Claims, held in the city of Washington on the 11th day of May, 1910, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, Fidelity Trust Company, formerly the Fidelity Insurance, Trust and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased, do have and recover of and from the United States the sum of four thousand two hundred and eighty-six dollars and thirty-one cents ($4,286.31).

BY THE COURT.

46 X. APPLICATION FOR AND ALLOWANCE OF APPEAL.

From the judgment rendered in the above-entitled cause on the 11th day of May, 1910, in favor of claimant, the defendant, by their Attorney-General, on the 11th day of May, 1910, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney-General.

Filed May 11, 1910.

Ordered: This 11th day of May, 1910, that the above appeal be allowed as prayed for.

BY THE COURT.

47 In the Court of Claims.

FIDELITY TRUST COMPANY, FORMERLY THE FIDELITY Insurance, Trust and Safe Deposit Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased,
v.
THE UNITED STATES. } No. 30020.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the court and the order overruling the demurrer of the defendants; of the traverse of the defendants; of the submission of the case; of the findings of fact and conclusion of law filed by the court; of the final judgment of the court; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 11th day of May, 1910.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No., 22162. Court of Claims. Term No., 936. The United States, Appellant, vs. The Fidelity Trust Company (formerly The Fidelity Insurance, Trust and Safe Deposit Company), as executor and trustee under the last will and testament of Walter H. Tilden, deceased. Filed May 12, 1910. File No., 22162.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 548.

UNITED STATES, *Appellant*,

vs.

FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED.

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS.

MOTION TO ADVANCE.

On behalf of Appellee, the Fidelity Trust Company, as executor and trustee under the last will and testament of Walter H. Tilden, deceased, we respectfully move this honorable court to advance this case for early hearing.

We are authorized to state the Attorney-General concurs in this motion.

The grounds upon which this motion is made are as follows:

1. This case grows out of the Spanish-American War Revenue Law, approved June 13, 1898 (30 Stats. L., 448), and involves the question of the refundment of moneys collected as taxes upon life estates in personal property under the Refunding Act of June 27, 1902 (32 Stats. L., 406).

2. Numerous cases involving the identical question are pending in the Federal Courts. There are five such cases now pending in the Court of Claims.

3. Over one thousand claims depend upon the decision of this court in this case. These claims are being held, without action, in the Treasury Department.

The annual report of the Commissioner of Internal Revenue dated November 1, 1910, to the Honorable Secretary of the Treasury, in regard to this class of claims, states:

> "The remainder of legacy tax claims are held awaiting a decision of the Supreme Court as to the legality of tax on estates for life and years, which decision is expected sometime during the present fiscal year. These claims aggregate a little more than $2,700,000."
>
> * * * * * * * * *
>
> "All of the various legacy-tax cases growing out of the War Revenue Act of 1898 have now been decided, except those cases involving the question of the legality of the tax on estates for life and years. A test case is now pending in the Supreme Court and an early decision is hoped for."

The test case above referred to by the Commissioner of Internal Revenue is the case at bar.

4. The decision in this case will determine the ownership, between the United States and several thousand of its

citizens, of a large sum of money and will terminate a vast amount of pending litigation. It is therefore, a matter of public importance that the case be heard as soon as practicable.

Respectfully submitted,

A. R. SERVEN,
BARRY MOHUN.

PAUL FULLER,
McGOWAN, SERVEN & MOHUN,
R. W. JOYCE,
Of Counsel.

Service of a copy of the above motion is acknowledged.

GEO. W. WICKERSHAM,
(H.)
Attorney-General.

Dec. 17, 1910.

OCT 10 1910
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 280

UNITED STATES, *Appellant*,

vs.

FIDELITY TRUST COMPANY (Formerly the FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), as Executor and Trustee under the Last Will and Testament of Walter H. Tilden, Deceased.

MOTION TO DISMISS OR AFFIRM, WITH NOTICE, BRIEF AND AFFIDAVIT IN SUPPORT THEREOF, AND TRANSCRIPT OF RECORD.

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BARRY MOHUN,
Attorneys for Appellee.

PAUL FULLER,
McGOWAN, SERVEN & MOHUN,
R. W. JOYCE,
Of Counsel.

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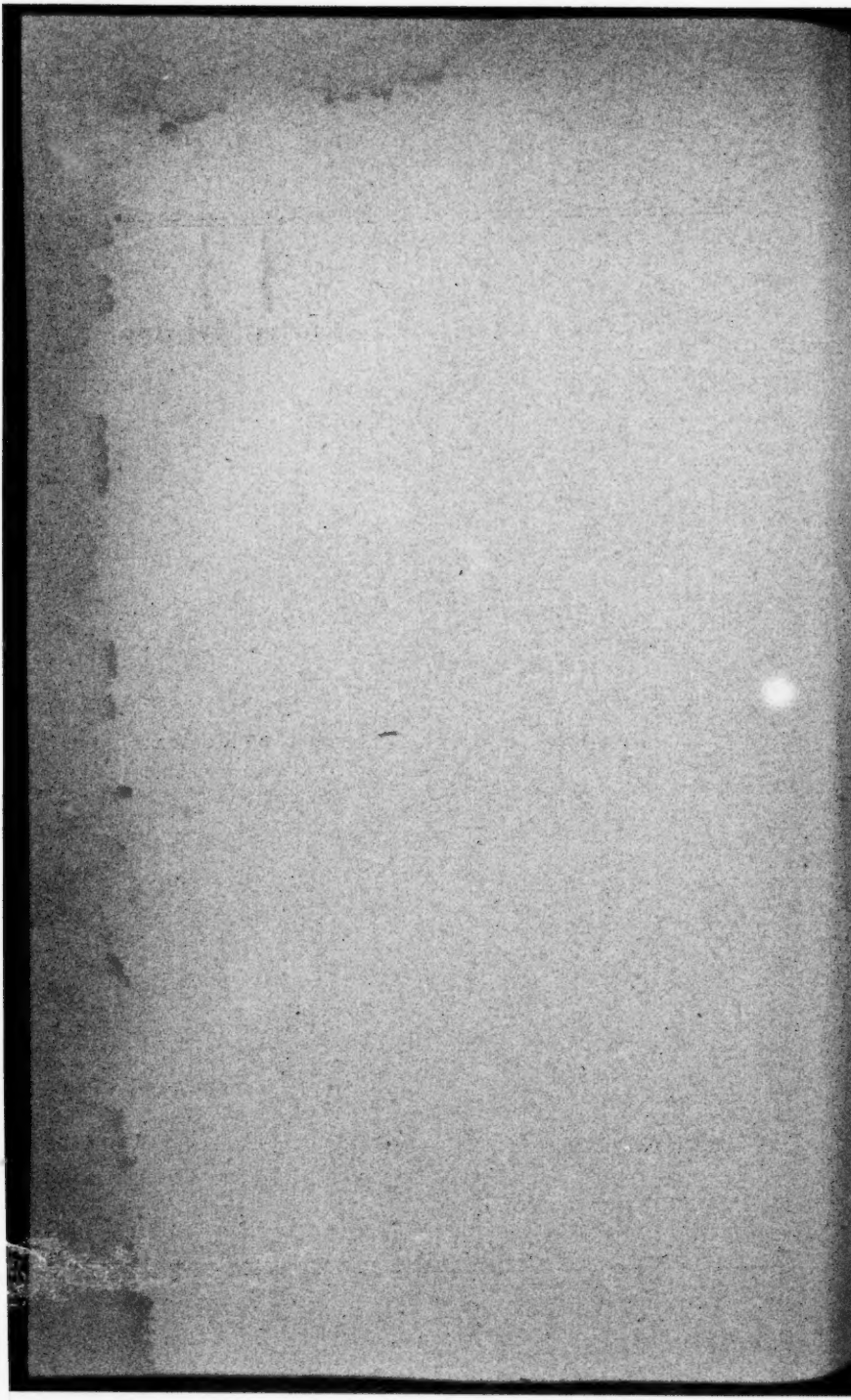

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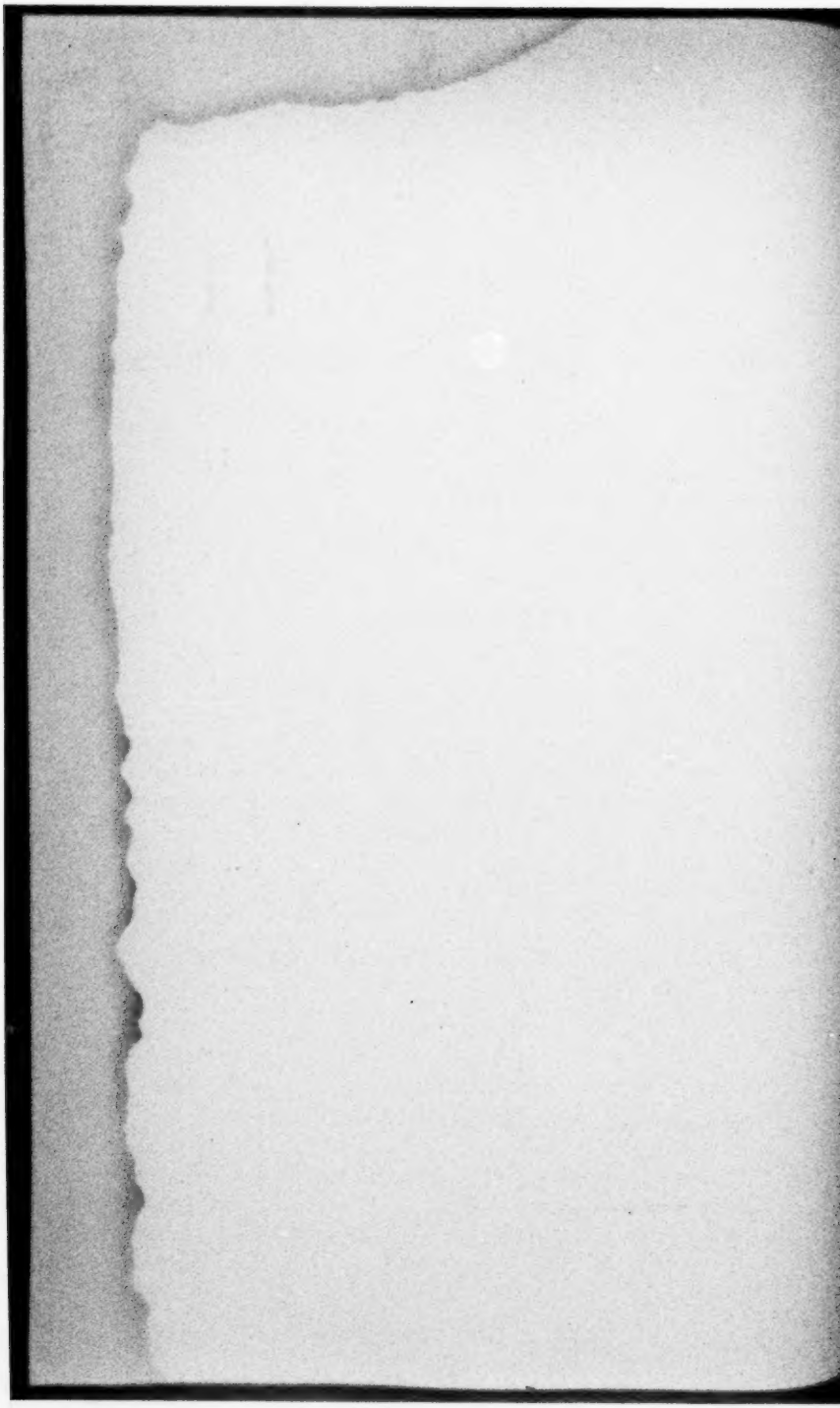

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 548.

UNITED STATES, *Appellant,*

vs.

FIDELITY TRUST COMPANY (Formerly the FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), as Executor and Trustee under the Last Will and Testament of Walter H. Tilden, Deceased.

MOTION TO DISMISS OR AFFIRM.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellee moves this Honorable Court to dismiss the appeal herein or affirm the judgment of the Court below, and in support thereof respectfully states as follows:

STATEMENT.

This is an action brought in the Court of Claims for the recovery of moneys paid as legacy taxes under the act commonly known as the Spanish War Revenue Law (30 Stats. L., 448, Amended 31 Stats. L., 946) and, as appellee contends, refundable under section three of the Act approved June 27, 1902 (32 Stats. L., 406). The opinion of the Court below, sustaining appellee's contentions both as to the jurisdiction and the merits, will be found at pages 18 *et seq.* of the record attached hereto. The moneys were collected as taxes from appellee, as Executor and Trustees under the will of Walter H. Tilden, upon the calculated and estimated value of the alleged present worth of the income to endure during the estimated life-expectancy of Mary Wadleigh Stokes, from the residuary estate of the testator. The method by which such taxes were calculated is shown in the findings of fact by the Court below (Rec., pp. 31 and 32, finding V).

The third section of the Refunding Act of June 27, 1902, *supra,* is as follows:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July

first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hu ıdred and two."

In the case of Vanderbilt vs. Eidman (196 U. S. 480, 500) this Court held the above quoted section to be declaratory of Section 29 of the taxing act.

The contention of appellee is that although the moneys paid by it as taxes were illegally collected, this fact is immaterial because the refundment of the same is directed by the third section of the Act of June 27, 1902, and that the principle here involved has been heretofore settled and determined by this Court in accordance with appellee's contentions.

ARGUMENT.

While this Court may conclude after an examination of the record and accompanying papers that appellee has failed to show lack of jurisdiction of this case or that there are defects in the appeal, we, nevertheless, contend under the rules and decisions of this Court the motion should be entertained and that action as prayed be taken thereon.

It is upon Rule 6, Clause 5, both as expressed and as construed by this Court, that appellee predicates this motion supported by the allegation that the appeal was taken for delay only, as the question at issue has been heretofore settled by this Court.

In regard to the construction of this rule, we invite attention to the following from the opinion of the Court in the case of City of Chanute vs. Trader (132 U. S., 210):

"In the present case there does not appear to be *any* ground for contending that this Court has no jurisdic-

tion, yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only.

* * * * * * * * *

"But without putting a different interpretation on subdivision 5 of Rule 6 from that which has heretofore prevailed, we are of opinion that the judgment in the present case must be affirmed."

To the same effect see also Hinckley vs. Morton (103 U. S., 764); and Swope vs. Leffingwell (105 U. S., 3). The case of Hecker vs. Fowler (66 U. S., 95) is not in conflict with the above cases because it was decided long prior to the adoption of Clause 5 of Rule 6 in its present form on November 4, 1878 (97 U. S., VII).

No damages for delay or double or even single costs can be awarded in this case against the appellant since neither Section 1010 of the Revised Statutes nor Rule 23 making provision therefor are applicable to the United States. Indeed when it is recalled that under Section 707, Revised Statutes, the United States has in all cases from the Court of Claims the right of appeal to this Court a construction, other than that now contended for by appellee, would place successful litigants in that Court completely at the mercy of the Government, so far as the loss of time is concerned, in all cases of appeals without merit. The case at bar would seem to be particularly in point because it is shown the Department of Justice had prior to the argument of the case below advised the Secretary of the Treasury that claims of the character here involved should be forthwith paid and further that the Department of Justice took no part in opposition to this case on the merits in the Court below, either by brief or argument. It is unnecessary to invite the Court's attention to its repeated declarations that when the Government has once given its consent to be sued it is possessed of no greater rights before the courts than a citizen.

Hence the several cases in which motions to dismiss or affirm have been denied on the ground of lack of color in the motion to dismiss, and in which the Court has stated it would impose damages and double costs if it appeared upon the hearing on the merits that the writ or appeal had been taken for delay only, as in Whitney vs. Cook (99 U. S., 607), and Amory vs. Amory (91 U. S., 356), have no application to this nor to any other case in this Court in which the Government is appellant.

The rule under which this motion is made is by its very terms clearly applicable to the facts here presented. It is there provided that a motion to affirm may be made in conjunction with a motion to dismiss "* * * on the ground that, *although the record may show that this Court has jurisdiction, it is manifest the writ or appeal was taken for delay only,* or (on the ground) that the question on which the jurisdiction depends is so frivolous as not to need further argument." (Rule 6, Clause 5.)

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED BECAUSE THE QUESTION INVOLVED IN THIS CASE HAS ALREADY BEEN SETTLED BY THIS COURT. THIS APPEAL WAS, THEREFORE, TAKEN FOR DELAY ONLY.

By this appeal the Government is again seeking to have this Court review a principle which it established by its unanimous opinion in the case of Vanderbilt vs. Eidman (196 U. S., 480) and which has been followed by various inferior courts. This Court has heretofore denied applications for writs of certiorari in three cases in which the decisions of the Circuit Courts of Appeal were in accord with this principle.

The treatment accorded appellee and others similarly situated by the Treasury Department and the harassing delay to which it and they have been subjected, as well as the re-

fusal of that department to abide by the advice of the Attorney-General in the premises, are set forth in the affidavit constituting Appendix A of this brief. (Page 17.)

In the leading case of Vanderbilt vs. Eidman, *supra,* it was held the taxation of the halves of the residuary estate, the payment of which to the son of the testator was conditioned upon his attaining the ages of 30 and 35 years, respectively, was illegal and unlawful because the law had been repealed before the beneficiary could come into the possession and enjoyment of the legacy. As shown by the opinion it was contended on behalf of the Government that the son, Alfred G. Vanderbilt, had a vested interest in the remainder and that the same was, therefore, taxable. In this connection the Court says:

> "Concluding, as we do, that there was no authority under the act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, *conditioned on his attaining the ages of thirty and thirty-five, respectively,* it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government."

We call particular attention to the words "conditioned on his attaining the ages of thirty and thirty-five years, respectively"; conditions which had to be fulfilled during the existence of the law to render the interests taxable. It is in precisely this essential particular that the principle of the Vanderbilt case embraces fully the principle of this case and of Disston vs. McClain (147 Fed. Rep., 114, Certiorari denied 207 U. S., 587). In the Disston case the question presented was the right of the Internal Revenue officials to tax the present worth of definite annuity payments which were not due until after the repeal of the law. The Circuit Court of Appeals for the third circuit held, in an opinion by Judge

Gray, that the only sums taxable were those received in possession and enjoyment by the annuitant prior to the repeal of the taxing law on July 1, 1902, and that taxes on annuity payments due subsequent to that date were refundable.

In the case of Lynch vs. Union Trust Co. (164 Fed. Rep., 161, Certiorari denied 214 U. S., 523) the question presented was the right of the Internal Revenue officials to tax the present worth of payments on account of income for years which were not due until after the repeal of the law. The Circuit Court of Appeals for the Ninth Circuit held that the only sums taxable were those received in possession and enjoyment by the beneficiary prior to the repeal of the taxing law and that taxes upon payments due subsequent to that date were refundable.

The sole contingency existing in (a) remainders, as in the Vanderbilt case, (b) annuities, as in the Disston case, and (c) life interests or interests for years, as in the Lynch case, and in the case at bar, is that the legatee be alive on the date when the payment becomes due. This clearly demonstrates the identity of the cases. Where a legatee has the right to receive at stated intervals the income from personal property during his life or for a term of years, each and every periodical payment is separately conditioned upon the beneficiary being alive to receive such payment. There cannot, therefore, be any legal distinction between the right to tax the present worth of the corpus, or, a part of the corpus of an estate, the payment of which is conditioned upon the beneficiary being alive on the date of payment, and the right to tax the present worth of income, each payment of which is likewise conditioned upon the beneficiary being alive on the date of payment.

The act under which the taxes were collected was, as is shown by its title, a war revenue measure. It was to be only temporarily in force. By all its provisions and by the decisions construing the act

the intention and purpose to tax only those who received personal property during the time the emergency existed is clearly and unmistakably shown. The Act of June 27, 1902, was passed at a time when there was a surplus in the National Treasury, created largely by war taxation, and the act carried the intention and purpose, just adverted to, completely into effect by prohibiting the collection of taxes upon interests which had not vested and could not vest absolutely in possession or enjoyment prior to the repeal of the law, and by directing the return of the moneys which had been collected upon such interests. The war revenue law had already been repealed to take effect July 1, 1902 (Act April 12, 1902, 32 Stats. L., 96), and hence no taxes could be collected from the estates of persons who died subsequent to that date but Congress was not satisfied with the repeal only. It went further and by the refunding act of June 27, 1902, directed the return of all moneys collected except where the interests were *"absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."*

Immediately after the decision of this Court in the case of Vanderbilt vs. Eidman, *supra,* the Secretary of the Treasury began the refundment, under the third section of the Act of June 27, 1902, *supra,* out of the continuing appropriation made by that act and will now so refund all moneys collected as taxes upon the calculated values of remainder interests which were not due and payable until subsequent to July 1, 1902.

Immediately after the denial by this Court of application for certiorari in the Disston case the Secretary of the Treasury began the refundment and will now refund, under the third section of the Act of June 27, 1902, all moneys collected as taxes upon the calculated values of annuity payments due subsequent to July 1, 1902. (Appendix A.) Thus it has been acknowledged that remainders not due un-

til after July 1, 1902, and annuity payments not due until after that date are contingent beneficial interests not absolutely vested in possession or enjoyment as those words are used in the refunding act of June 27, 1902.

In urging this Court to issue writ of certiorari in the Disston case the Solicitor-General conceded that the principle there involved embraced ordinary life interests. In the brief in support of the motion the Solicitor-General stated:

> "The Circuit Court of Appeals held in substance, reversing thereby the Circuit Court, that no part of a legacy *consisting of a life interest in personal property* was taxable beyond that portion of such interest which became absolutely vested in physical possession prior to July 1, 1902, the date of the repeal of the War Revenue Act" (pp. 1 and 2).

On October 19, 1908, this Court denied application for certiorari made on behalf of the Government in the case of United States vs. Isaac Stephenson *et al.*, as Executors, etc. (212 U. S., 572). Although the doctrine of the case of Tilghman vs. Eidman (136 Fed. Rep., 141) was involved, nevertheless, all the taxes in issue were collected on the estimated present worth of incomes for life. This appears from the following, on page 6 of the brief in this Court on behalf of respondents in that case:

> "In this case the taxes sought to be recovered relate only to the net annual income from the residuary estate created by the will."

After the various actions shown in Appendix A the Government applied to this Court on May 3, 1909, for writ of certiorari in the case of Lynch vs. Union Trust Co., *supra*, in which there was but one question and that identical with the case at bar. Such application was denied on May 17, 1909 (214 U. S., 523).

In Hertz, Collector, vs. Woodman, *et al.*, No. 640, October Term, 1909 (218 U. S., 205), the issue related solely to the interpretation of the taxing law and the act by which it was repealed. The refunding act of June 27, 1902, upon which the case at bar is solely predicated, was not and could not have been involved in view of the wording of the question certified in the Hertz case. The refunding act is not mentioned in the opinion of the Court nor in the dissenting opinion.

It cannot be successfully urged that the case of Westhus vs. Union Trust Co. (164 Fed. Rep., 795) conflicts with our contention that the doctrine involved in the case at bar has been heretofore settled by this Court. On the contrary the fact that this Court denied application for certiorari in Lynch vs. Union Trust Co. *subsequent* to the decision in the Westhus case simply adds force to the statement that this Court regards the question in this and in the Lynch case as definitely and finally settled.

If anything further be required concerning the Westhus case we invite the Court's attention to pp. 18-21 of brief in opposition to the Government's motion for certiorari in Lynch vs. Union Trust Co. (No. 851, October Term, 1908) filed by appellee herein with permission of this Court.

It has thus been shown that this Court has condemned—

First. Taxation of remainders not due until after the repeal of the law on July 1, 1902.

Second. Taxation of payments on account of annuities not due until after the repeal of the law.

Third. Taxation of payments on account of ordinary interests for life or for years not due until after the repeal of the law.

We have further shown that in the cases of the first and second of the above named classes the Treasury Department has ever since the action of this Court thereon promptly made refundments to claimants under the refunding act

of June 27, 1902, out of the continuing appropriation made thereby, and will now so refund.

As to the third class, the Secretary of the Treasury declines to refund regardless of the decision in the Vanderbilt case, the denial of application for writs of certiorari in the Disston, Stephenson and Lynch cases and of the advice of the Attorney-General that it was his duty to make such refundments.

It may be in cases involving merely private litigants, that the denial by this Court of certiorari cannot be taken as approving the views expressed by the Circuit Court of Appeals. In a suit brought against the Government or one of its officers for the recovery of taxes collected, the situation is, however, quite different. This Court is one of the agencies of the Government from which the recovery is sought. One of its functions is to protect the sovereignty by which it was created from the exaction of illegal and unwarranted payments. If, then, this Court has declined to step in and reverse the subordinate Court which has permitted an exaction, it must be deemed that it sees no ground for its intervention. To give to its action the very least possible weight, it has announced, through the application of the principle of *stare decisis*, that it will not take jurisdiction of or reverse judgments against the Government based on claims of like character. Examination of the briefs in support of the Government's motions for certiorari in the Disston case (No. 336, October Term, 1907) and in the Lynch case (No. 851, October Term, 1908) shows the Solicitor-General took great pains to place upon this Court the entire responsibility in the premises.

A reversal of the case at bar would make it incumbent upon the Government for the second time to seek the collection from citizens of many thousands of dollars which it has previously refunded to them, such refundments having been made as a direct result of the decision of this

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Court in the Vanderbilt case and of the denial of application for certiorari in the Disston case.

The following should not be overlooked: (a) The taxing law was a temporary measure, enacted solely for the purpose of meeting the extraordinary expenses of war. (b) The taxing act refers to the "actual" and "clear" value as the subject upon which the tax was to attach not estimated or calculated values. (c) The taxing act required that taxes paid under its provisions must be deducted from the particular legacy or distributive share upon which the same were chargeable. (d) The taxing act makes no mention of either annuities or incomes of any kind or description.

As was pointed out by Judge Gray in Disston vs. McClain, *supra:*

> "The statute nowhere refers in express terms to the interest or income of a legacy, nor does it impose any tax in respect thereto, before it is actually received. If the act had intended that the interest in a fixed and definite income for life, payable out of personalty alone, much more in such an income payable out of the total income of the whole residuary real and personal estate, should be taxed, this intention would not be left to inference, but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done in the collateral inheritance tax laws of the States of New York and New Jersey." (147 Fed. Rep., 122.)

In New York the Inheritance Tax Law, in this particular, provides:

> "The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of

> policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum." (Art. 10, Chap. 908, Laws of 1896.)

The provision of the laws of Maine (Chaps. 8, 9 and 10, Revised Statutes, Me.), is as follows:

> "In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and five per cent compound interest."

In Massachusetts an almost identical provision is found.

In the several other States in which Inheritance Tax Laws are in force and the right to income is taxed, enactments of the character stated above will be found, or other provisions expressly designating the methods to be used in the ascertainment of such values.

The above illustrations are exceedingly significant when it is remembered that the Act of June 13, 1898, makes no provision whatever for the *valuation* of incomes or for "estimating" the value of rights to incomes, but fixes as the subject for taxation property "in possession" at its "actual" and "clear" value.

Of legacies and distributive shares Judge Gray in the Disston case says:

> "In the first place, it is to be noticed that the tax is imposed in general terms upon legacies and distributive shares. These words possess a definite meaning, and no confusion or difficulty need arise as to the subjects with reference to which taxation is imposed. Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the personal estate of an intestate, so a legacy is a definite gift by will of personal property,

either general and pecuniary, or specific. As such, a legacy is of a specific article, or of specific articles, of personal property, or of an ascertained and definite pecuniary amount, and may be readily valued by the executor or trustee having it in charge. It is the corpus to which the legatee is entitled in possession or enjoyment. The legacy in question, under the will of the testator, is not a sum certain given once for all to the legatee, but a yearly sum of $15,000, to be paid to Rachael Asch in stated quarterly payments during the term of her natural life, out of the income of the whole estate, real and personal, of the testator, devised and bequeathed to trustees for the purposes of his will. The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each contingent, before vesting, on the legatee's being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman case, until and as it takes effect in possession or enjoyment." (147 Fed. Rep., 117.)

In Lynch vs. Union Trust Co., *supra* (Certiorari denied, 214 U. S., 523), Judge Van Fleet in speaking for the Circuit Court of Appeals said:

"Moreover, as held in Vanderbilt vs. Eidman, the purpose of the act was to subject to taxation only beneficial interests, which by reason of being absolutely vested in possession or enjoyment have a value capable of being definitely ascertained—'actual value' as expressed in Section 29, or 'clear value' as expressed in Section 30. The estate or interest here sought to be taxed was very clearly not of that character. While the right to receive the income was vested, it was a right the enjoyment of which, as with the legatee in Disston vs. McClain, was contingent upon the beneficiaries living to receive it; and, furthermore, as in that case, this income was to be derived from the

entire residue of the estate of the testator, real and personal alike. It was necessary for the collector, therefore, under the limitations of the act, which taxes personal property alone, in order to reach his basis of value for the assessment, to first segregate the real from the personal property, and then resort, not only to the use of life or mortality tables, but to employ an arbitrarily assumed rate of interest in making the computation. * * * So that, when Congress employed the expressions 'actual value' and 'clear value,' it very evidently intended to convey the idea of definite or certain value—something in no sense speculative. Here it is at once apparent that the result reached as a basis for the tax through the method adopted was at most an approximation or merely speculative; and it could be nothing else. Life or annuity tables are never employed to ascertain definite or actual results, but only as guides to a reasonable approximation. Vicksburg, etc., R. R. Co. vs. Putnam, 118 U. S., 545, 7 Sup. Ct., 1, 30 L. Ed., 257, and cases there cited." 164 Fed. Rep., 167.

As a result of the action of this Court in refusing certiorari in the case of Disston vs. McClain, *supra*, taxes collected upon annuity payments due subsequent to July 1, 1902, have, as heretofore pointed out, been refunded under the Act of June 27, 1902. Our position, therefore, that the question involved in this case has been settled by this Court by its unanimous opinion in Vanderbilt vs. Eidman, *supra*, and by its denials of certiorari in the Disston and Lynch cases, narrows itself to the single proposition of appellant being able to show such a distinction in the taxing law of June 13, 1898, and the refunding act of June 27, 1902, that while taxes collected upon deferred payments of annuities are refundable under the latter act taxes collected upon deferred payments of ordinary interests for life are not so refundable.

We submit it is obviously impossible to maintain such a distinction and, therefore, the judgment of the Court below should be affirmed, thus putting an end to the vexatious delays to which appellee and others similarly situated have been subjected.

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APPENDIX A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 548.

UNITED STATES, *Appellant,*

vs.

FIDELITY TRUST COMPANY (Formerly the FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), as Executor and Trustee under the Last Will and Testament of Walter H. Tilden, Deceased.

CITY OF WASHINGTON, *District of Columbia.* } ss.

Barry Mohun, being first duly sworn, deposes and says he is a member of the firm of McGowan, Serven & Mohun, attorneys for the appellee herein, and that he is a member of the bar of this Honorable Court.

Deponent has had immediate charge of this case since its inception and is personally acquainted with the steps taken in its prosecution, the causes of the delays which have en-

sued and the various other matters and things hereinafter set forth.

The officials of the Department of Justice offered no defense upon the merits of this case in the Court of Claims, either by brief or oral argument. That part of the brief in the Court below pertaining to the merits of this case and the oral argument relating thereto were prepared and conducted by a representative of the Treasury Department who was and is now in charge of the Claims Division in the Bureau of Internal Revenue of said Department. The sole question raised in the Court below by officials of the Department of Justice related to the jurisdiction of that Court to hear and determine the case.

Under date of August 12, 1909, after an investigation and consideration of the matter by the Department of Justice extending over a period of many months the Acting Attorney-General informed the Secretary of the Treasury in writing that all claims of the character involved in this case should be forthwith paid under the terms of and directions contained in the third section of the Act of Congress, approved June 27, 1902 (32 U. S. Stats. L., 406) and out of the continuing appropriation made by that act. On or about the 26th day of January, 1910, deponent was officially advised that the Secretary of the Treasury had finally concluded not to follow the advice contained in the letter of the Acting Attorney-General of August 12, 1909, as aforesaid, and that he would take no action whatever in the matter. To deponent's best knowledge said letter of August 12, 1909, has never been recalled or modified by the Department of Justice.

Prior to filing the original petition in the Court of Claims appellee had presented various applications which were then and are now pending in the Treasury Department without action having been taken thereon; said applications are for the refundment of moneys under conditions in all essential

respects the same as the moneys involved in this case and directed to be refunded by the third section of the Act of Congress, approved June 27, 1902, *supra,* which moneys were paid by appellee as executor or trustee, or both, under the wills of various testators, as legacy taxes upon the alleged estimated and calculated present worths of incomes to endure during life or during definite periods of years.

The original petition in this case was filed in the Court of Claims on June 4, 1907, and under date of June 25, 1907, deponent's firm requested, in writing, the Assistant Attorney-General charged with the defense in said Court to cooperate with them in securing an early determination of the case. On June 27, 1907, deponent's firm received a reply to the aforesaid request as follows:

"DEPARTMENT OF JUSTICE, June 26, 1907.
"Messrs. McGowan, Serven & Mohun,
"1419 F Street, N. W.,
"Washington, D. C.
"Dear Sirs:

"In reply to your favor of the 25th instant, I would inform you that I have carefully examined the petition filed by you in the case of the Fidelity Trust Company, as executor and trustee under the will of Walter H. Tilden vs. United States, No. 30,020, and am satisfied that the questions involved are identical with those involved in the case of Disston vs. McClain (147 Fed. R., 114), and I will, therefore, take no steps in your case until the Disston case has been decided by the Supreme Court.

"Very respectfully,
"J. A. VAN ORSDEL,
"Assistant Attorney-General."

The case of Disston vs. McClain referred to in the above letter involved the refundment of moneys collected as taxes upon the calculated and estimated present worth of a defi-

nite annuity which was to endure during the life of the beneficiary, the Court having held such moneys refundable. In the case at bar the moneys were paid as taxes upon the calculated and estimated present worth of the income from a definite sum, which was to endure during the life of the beneficiary. On October 21, 1907, this Honorable Court denied the application made on behalf of the Collector for writ of certiorari in the case of Disston vs. McClain (207 U. S., 587), and immediately thereafter the Secretary of the Treasury acquiesced in the doctrine of that case and began the refundment under the third section of the Act of June 27, 1902, as aforesaid, of all moneys collected as taxes upon estimated and calculated present worths of definite annuities, to the extent that such sums had been so collected upon payments due the annuitants subsequent to July 1, 1902, the date when the repeal of the taxing law took effect; and the Secretary of the Treasury has ever since and will now, without regard to lapse of time, upon due application being made therefor, so refund all such moneys.

Among numerous other refundments made by the Secretary of the Treasury on account of annuity payments was one to appellee herein as executor under the will of John N. Hutchinson, late of Philadelphia, Pa., by which $8,166.84 were refunded to appellee as such executor on December 9, 1907, the refundment being made under the Act of June 27, 1902, and represented taxes collected upon annuity payments not due until subsequent to July 1, 1902.

Immediately after the denial of the application for writ of certiorari in the case of Disston vs. McClain, as aforesaid, deponent called such fact to the attention of the said Assistant Attorney-General and was informed by him that in spite of his statements in the letter to deponent's firm, above set forth, his Department had concluded to await the determination of the case of Lynch vs. Union Trust Company (164 Fed. Rep., 161), then pending on appeal before the Circuit Court of Appeals for the Ninth Circuit, and

which involved the identical question as the case at bar. That Court, on October 5, 1908, held that the moneys collected as taxes upon the calculated and estimated present worth of an income for years were refundable, and the only sums taxable were those which were actually received in the possession or enjoyment of the beneficiary prior to the repeal of the taxing law on July 1, 1902.

Under date of October 30, 1908, the Attorney-General in response to a letter dated October 14, 1908, from the Secretary of the Treasury, advised the Secretary that no application would be made by the Department of Justice to this Court for a writ of certiorari in the said case of Lynch vs. Union Trust Company. Notwithstanding the letter, as aforesaid, from the Attorney-General, the Secretary of the Treasury declined to allow any of appellee's several applications hereinbefore referred to. After a conference between deponent and the Attorney-General, deponent's firm on April 22, 1909, received a letter from the Attorney-General in which they were advised that he deemed it his duty to apply to this Honorable Court for writ of certiorari in the said case of Lynch vs. Union Trust Company.

On May 3, 1909, application was duly made to this Honorable Court by the Solicitor-General of the United States on behalf of Lynch, the Collector of Internal Revenue, in the case of Lynch vs. Union Trust Company, as aforesaid, for writ of certiorari, and such application was denied on May 17, 1909. (214 U. S., 523.)

Subsequent to the denial of said application for writ of certiorari and as heretofore set forth, the Acting Attorney-General on August 12, 1909, advised the Secretary of the Treasury that his Department had acquiesced in the doctrine of the case of Lynch vs. Union Trust Company, *supra*, and that all claims embraced within such doctrine should be refunded.

During all of the period intervening since the date of filing the original petition herein deponent has been repeatedly informed by officials of the Treasury Department that this and similar claims filed by appellee in that Department would be promptly paid as soon as advised by the Department of Justice of its acquiescence in the doctrine of the aforesaid case of Lynch vs. Union Trust Company.

Under date of May 19, 1909, H. T. Newcomb, Esq., a member of the bar of this Court, addressed a letter to the Honorable Secretary of the Treasury as follows:

"May 19, 1909.

"Dear Sir:

"I desire to bring to your attention the claim of Florence S. Buckland, of Philadelphia, executrix of the will of the late Harriet M. Severns, of that city, for the refund of $424.69, collected as a tax on contingent beneficial interests created by the will of the said Harriet M. Severns, which interests did not become vested prior to July 1, 1902. This claim was made under the refunding act of June 27, 1902, and is precisely within the principle decided in Union Trust Company vs. Lynch (164 Fed., 161) in which application for a writ of certiorari to the Supreme Court of the United States was made on May 3d and denied by that Court on May 17, 1909. The claim was filed on December 28, 1907, and many claims under the Act of June 27, 1902, filed subsequently, have been taken up and allowed. To consider and allow this claim at the present time would be to follow the precedent sanctioned by the action of the Department in allowing claims under the same act which were covered by the decision in Disston vs. McClain after the denial of the certiorari in that case.

"I therefore respectfully request early consideration and allowance of this claim.

"Very respectfully yours,

"(Signed) H. T. NEWCOMB,

"*Attorney for the Executrix.*

"Honorable Franklin MacVeagh, Secretary of the Treasury, Washington, D. C."

To which he received the following letter in reply:

"TREASURY DEPARTMENT,
"WASHINGTON, May 22, 1909.

"E. C. J.
"H. T. NEWCOMB, ESQ.,
"Nat'l Metropolitan Bank Building,
"Washington, D. C.

"Sir:

"Replying to your letter of the 19th instant calling attention to the claim of Florence S. Buckland, for the refunding of $424.69, legacy taxes paid by the estate of Margaret M. Severns under the principle involved in the case of the Union Trust Company vs. Lynch. and stating that as certiorari has been refused in said case by the U. S. Supreme Court, you request consideration and allowance of this claim, you are advised that said claim will be promptly disposed of when the Department of Justice advises this office of its acquiescence in the decision of the courts involving the principle aforesaid.

"Respectfully,
"(Signed) J. C. WHEELER,
"Deputy Commissioner."

As hereinbefore shown the Department of Justice under date of August 12, 1909, advised the Secretary of the Treasury, in writing, that it had acquiesced in the decision of the courts involving the principle aforesaid.

On or about the 11th day of January, 1910, deponent was informed that the Secretary of the Treasury while not willing to accept the advice contained in the letter of the Acting Attorney-General of August 12, 1909, heretofore mentioned, had decided to refer to the Court of Claims the question of the refundment of such moneys and that he would abide by the conclusion of that Court in the premises. On or about January 29, 1910, deponent was informed that the Secretary of the Treasury had changed his mind in this

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respect and that he would take no action whatever in regard to the matter. Deponent's firm then immediately proceeded with the prosecution of the case at bar in the Court of Claims to the end that on May 2, 1910, that Court rendered an opinion in favor of appellee. The case at bar would have been vigorously prosecuted in the Court of Claims by deponent's firm from the time of filing the original petition therein, viz: June 4, 1907, had it not been for the matters and things hereinbefore set forth.

And further deponent saith not.

BARRY MOHUN.

Subscribed and sworn to before me this 9th day of September, A. D. 1910.

MYDDELTON WOODVILLE,

[NOTARIAL SEAL] *Notary Public,*
District of Columbia.

NOTICE.

To HONORABLE GEORGE W. WICKERSHAM,
Attorney-General of the United States.

Sir:

Please take notice that the foregoing motion to dismiss or affirm, together with brief and affidavit in support thereof, and transcript of record will be submitted to the Supreme Court of the United States on Monday, the 10th day of October, 1910, at the opening of the Court on that day or as soon thereafter as counsel can be heard.

Respectfully,
A. R. SERVEN,
BARRY MOHUN,
Attorneys for Appellee.

Service of copy of attached Notice and Motion to Dismiss or Affirm, with brief and affidavit in support thereof and transcript of record, admitted this sixteenth day of September, nineteen hundred and ten.

GEORGE W. WICKERSHAM,
Attorney-General.
By W. J. HUGHES,
Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, APPELLANT,
v.
THE FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED. } No. 548.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

I.

Under subdivision 5 of rule 6 a motion to affirm will not be entertained except when made as an alternative of a bona fide motion to dismiss. And as there is no such motion to dismiss now before the court, the motion to affirm should not be entertained.

1. It is not pretended that this court is without jurisdiction to entertain the present appeal, nor that there is any defect in the proceedings relating thereto

which renders the appeal irregular. On the contrary, it is admitted that the appeal is in all respects regular, and that this court has jurisdiction to entertain it. The result is that this motion is in fact a simple motion to affirm, none the less so because it is stated to be an alternative motion to dismiss or affirm; and in the early case of *Whitney* v. *Cook* (99 U. S., 607), decided at the very term in which the present rule was adopted, it was distinctly and emphatically held that a mere motion to affirm could not be entertained under the rule. The court said:

> This is a motion to affirm only. Our amended rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are therefore compelled to deny the motion.

The soundness of this view has never since been doubted; but, on the contrary, it has been repeatedly declared that unless there is color for the motion to dismiss—which is the only test the court can have as to the *bona fides* of the motion—the motion to dismiss will not be entertained. There is no need to accumulate authorities upon this proposition. They are numerous, well known, and unanimous. Even *Chanute City* v. *Trader* (132 U. S., 210), relied on by appellee, is not at variance with them; for in that case the motion to affirm *was not entertained under rule 6 at all*, but was taken upon general principles, *independently of rule 6*. The court was careful to so state. It said (p. 214):

But *without putting a different interpretation on subdivision 5 of rule 6 from that which has hitherto prevailed*, we are of opinion that the judgment in the present case must be affirmed. A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered. If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This court, in the exercise of its inherent power and duty to administer justice, ought, *independently of subdivision 5 of rule 6*, to reach the mischief by affirming the action below. *This is a proper case for doing so.*

2. Of course it may be argued that the present motion may be maintained upon the authority of *Chanute City* v. *Trader*, independently of rule 6, but such is not the case. The *Chanute City* decision was based entirely upon the fact that the writ of error in that case was to the *execution of process to enforce a judgment*. No substantive right of either party was involved. The judgment in the main case had settled such rights finally and conclusively. Only the validity of the process to enforce the judgment could be questioned, and the court well said that there was special necessity for protecting parties against frivolous appeals in such cases. Further than that, it is obvious that the question raised by such an appeal is closely akin to that raised by a motion to dismiss;

for it necessarily is limited to the inquiry whether or not the lower court had power to issue the particular process under the circumstances and in the way it did. In the case at bar, however, the appeal goes to the merits of the controversy, and if a motion to affirm is to be entertained in such a case in the absence of even a colorable motion to dismiss, the result will be more intolerable than would be the practice sought to be stopped by the *Chanute City* decision; for this court would then be compelled to hear practically every case twice, first on a motion to affirm, and later (if the motion to affirm should be denied) when reached in due course on the docket. It may well be assumed that the cases in which the motion to affirm would be allowed would be few; and the court ought not to be burdened with the labor of hearing such motions in practically every case merely because an appeal or writ of error may occasionally be frivolous.

3. Indeed, the force of these considerations is recognized by the argument in support of this motion, and escape from their consequence is sought on the ground that a special rule should be established with reference to the Government, it being argued that even though such a motion as this should not be entertained in the case of an appeal by a citizen, a different rule should be applied to the Government because it can not be mulcted in damages in case the appeal should in the judgment of the court be deemed frivolous. There are three answers to this:

(*a*) The Government's course in all cases is determined by public officers sworn to perform their duties faithfully, according to law. It would be as great a violation of duty on their part to take an appeal for mere delay as it would be not to take one when there is good reason to believe it sustainable. The court should not assume that these disinterested, sworn public officers will violate their duties.

(*b*) Nothing is better established than the rule that the Government is not to be held accountable for the misfeasance of its officers in exercising discretionary powers. To deprive the Government of its right to have its appeals heard in open court and decided only after full argument, oral and printed, a right which is accorded to all other litigants, would plainly penalize the Government not even for actual misfeasance but for the possible misfeasance of its officers.

(*c*) It has never yet been held, and it is doubtful if it was ever before suggested, that the Government was entitled to less consideration in court than its citizens. The contrary has always been supposed to be true. Thus statutes of limitation and the doctrine of estoppel *in pais* do not operate against the Government. Is this policy to be reversed?

II.

Even if this motion may be entertained, it should be denied. The question raised by this appeal is not a frivolous one; nor has it ever been decided by this court. Further, the decisions of the Circuit Courts of Appeals in respect to it are conflicting.

In such circumstances the Government is not chargeable with bad faith in taking this appeal.

1. It is not proposed in this brief to argue the merits of the case at all elaborately. Such course would extend the limits of the brief unduly; because the sole question now before the court is whether or not the question presented by this appeal is so frivolous as to warrant the conclusion that the appeal was not taken in good faith but merely for delay. But it is necessary to say enough concerning the merits of the case to show that instead of being frivolous this appeal is well grounded and worthy of serious consideration by this court. The argument in support of the Government's contention will therefore be presented as briefly as possible. It is as follows:

(1)

The taxed bequest was a *life estate* in all the testator's residuary property, which estate had fully vested in actual possession and enjoyment before the repeal of the inheritance-tax law. It was not an annuity. By an ingeniously involved form of statement counsel seek to make it appear otherwise, but the language of the will speaks for itself. It is:

> Fifteenth: I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real and personal, unto The Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, its successors and assigns, in trust, *to hold the same*, either as at present invested or in such securities as to

> my said trustee may be deemed safe, *and to collect and receive the rents, interest, dividends, and income therefrom, and pay the same over,* less all proper charges thereon, *to the said Mary Wadleigh Stokes,* in quarterly payments, *during all the period of her natural life,* * * * . (R., 3.)

That this bequest was not an annuity but a life estate in the residuary property is demonstrable in two ways:

(*a*) It lacks the essential characteristics of an annuity, which is "*a yearly sum* stipulated to be paid to another in fee or for life or years, and *chargeable only on the person of the grantor.*" (Anderson's Law Dictionary, p. 61; Bouvier's Law Dictionary, Rawle's Rev., p. 144.) Here there is neither a bequest of a fixed sum nor a personal charge against any one. The legatee is entitled to whatever income the estate yields, and only to that, whether it be great or small, and if it fails to yield *anything* she gets nothing. Further, the bequest is not a charge upon any person nor even on any property. The gift is the beneficial use of the property, not a mere charge upon it.

(*b*) Except that the *legal* title to the property is not vested in the beneficiary, the bequest has all the incidents and characteristics of the ordinary legal estate for life. A life estate is nothing more nor less than the right during the life, either of the tenant or of another, to the use and enjoyment of property. If it be income-producing property, such use and en-

joyment consists of the taking of the income; and all the residuary property in this instance was of that kind (R., 31)—the use of the testator's dwelling house and the personal property connected with it having been granted to the same legatee by the twelfth clause of the will (R., 3). This legatee therefore obtains, under the stated clause of the will, the identical interest in the residuary property which she would have obtained had it been bequeathed directly to her. The fact that her title to it is equitable instead of legal can not possibly change the bequest of what is actually an estate in property into an annuity. An interest in property does not cease to be such merely because it is equitable instead of legal. Suppose, for example, that instead of the language employed the will had stated that the property was to be held for the sole use, benefit, and behoof of the beneficiary, would it then be claimed that she was a mere annuitant? And yet the actual result of the bequest is precisely the same in either case. For just that reason, therefore, is it impossible to view the bequest in this case as an annuity.

(2)

If the foregoing argument be sound, if the beneficial interest of the legatee in this case is a life estate in the residuary property, and not a mere annuity, then the propriety of the tax in this case is not open to dispute. Her estate was vested in actual possession and enjoyment. That is to say, the legal title to the property had passed to the trustees for her benefit long before

the repeal of the act. Her right to such enjoyment so long as she lived was not dependent upon any contingency. It was indefeasible. The fact that the trustees paid over the actual income in quarterly installments no more prevented her *estate in the property from which the income was derived* from being vested in possession and enjoyment than would the fact that the interest on bonds, in which a legatee had a legal life interest, was payable at like intervals prevent such legatee's estate in such bonds from being vested in possession and enjoyment. And the question whether or not the present legatee's interest was taxable is therefore just exactly as if she had been given a legal life estate in the residuary property, which had vested in possession and enjoyment prior to the repeal of the inheritance-tax law. Can there be any doubt about the taxability of such an estate at its estimated value at the time when it vested in possession and enjoyment? To take a concrete case (for this is the crux of the matter), suppose a testator devised all of his personalty to A for life, remainder to B; that the estate had been administered and the personalty delivered by the executor to A, would his life interest not have been then and there taxable? If not then, when? Would the Government have to wait until A died before collecting the tax? We have yet to hear it claimed that a life estate, the right to which has become indefeasible and the enjoyment of which has actually begun, is a "contingent beneficial interest," and unless it is, then it was taxable under

the act as a whole at the time it vested and not at the time it terminated or at any intermediate time.

Before leaving this subject, attention should be called to the fact that we are not here concerned with the correctness of the collector's method of estimating the value of this life estate. If there was any error in that respect it was correctible only by application for refund made under the general laws relating to refund of erroneously assessed taxes. It is not correctible under the act of 1902, which only authorizes refund in case the collected taxes were assessed on *contingent* interests. And proceedings under the general statutes were barred by limitation (R. S., sec. 3228) long before this application was made.

(3)

Even if the bequest in this case was in fact an annuity it is still a legacy, the value of which is capable of estimation as a whole, and it should be taxable as such and not piecemeal. Various considerations show this:

(*a*) An annuity is an incorporeal hereditament. It is even treated for the purposes of descent as though it were real property. (2 Black Com., Lewis' ed., p. 40; see especially the notes.)

(*b*) Though it is a mere personal charge, yet the *right* to it may absolutely vest. Is not this vested right *property*, capable of taxation? It must be remembered that the right to any annuity may be either vested or contingent. An illustration of the latter sort is found in the will (and clause of it) now

before the court, wherein it is provided that in case the present legatee, Mary Wadleigh Stokes, should die before her mother, Frances Wadleigh Stokes, then the latter shall be paid an annuity of $1,000 per annum during the remainder of her life. If Mary Wadleigh Stokes should die before Frances Wadleigh Stokes, would not something vest in the latter which she did not have before, viz, an indefeasible right to an annuity, and would not that right be a taxable legacy?

(*c*) Practical considerations compel such construction. There is no doubt of the taxability of the annuities. The only question is whether they shall be taxed as an entirety at their estimated worth when the right to receive them becomes indefeasible, or whether they shall be taxable monthly, quarterly, semiannually, or annually as they are actually paid over. The trouble, expense, and difficulty of the latter course are obvious and should resolve any doubt against it.

2. From what has been said it will be seen that the two propositions mainly relied upon by the Government in this case are: First, that the bequest here in question created a life estate in the legatee, Mary Wadleigh Stokes, and was not a mere annuity. Second, that a life estate vested in possession and enjoyment is taxable when it vests and not when it terminates or at any intermediate time. Neither of these propositions has ever been passed upon by this court. The only *decided* case which is claimed to bear on them is *Vanderbilt* v. *Eidman* (196 U. S., 480); but it seems

almost an imposition upon the court to take the time to point out the utter irrelevancy of that case. The sole question there considered was whether or not a tax was assessable "upon the right to the residue" of the estate of Cornelius Vanderbilt "which Alfred G. Vanderbilt might possess or enjoy" in fee simple "in the future, if he lived to the ages specified in the will," and which he had of course not attained when the tax was collected. It was held that until Alfred G. Vanderbilt reached the ages specified in the will and thereby actually received the benefit of the bequests, no tax could be assessed against them. There was no question as to whether such a bequest as the present one was an annuity or a life estate. That question was put out of the case by the voluntary payment of the tax upon the interest of Alfred G. Vanderbilt up to the time he reached the ages of 30 and 35 years. And there was not the slightest reason for determining nor any hint at decision of the question of whether a vested life estate in the legatee's actual possession can be taxed at once. Indeed, although the brief in support of the present motion starts with the statement that this case is determined by *Vanderbilt* v. *Eidman*, the argument adroitly glides away from that proposition to the contention that the questions now before the court were settled *by the refusal of writs of certiorari* in the cases of *McClain* v. *Disston* (207 U. S., 587) and *Lynch* v. *Union Trust Co.* (214 U. S., 523).

It is frankly admitted (Brief, p. 11) that "in cases involving merely *private* litigants, the denial by this

court of *certiorari* can not be taken as approving the views expressed by the Circuit Court of Appeals," but it is claimed that when the *Government* is the applicant for *certiorari* it is the *imperative duty of this court to actually pass upon the merits of the case before denying the writ;* because otherwise the Government might be subjected to an "illegal exaction," which, according to counsel, it is this court's duty to prevent.

Assuming this contention to be serious, it may be conclusively answered in four ways: First. If it be sound, then the Government has an absolute right of review by this court in every case, notwithstanding the provisions of the Court of Appeals act; for the Government, like every other litigant, has the right to *ask* for certiorari in every case, and if the mere asking for it puts upon this court the duty to determine the merits (as it must do if it is to be sure that the Government is not being subjected to an illegal exaction by the judgment below) then the Government can, by asking for *certiorari*, obtain a full review of every judgment against it. Second. If the denial by this court of a government application for *certiorari* constitutes an adjudication against the Government on the merits, then it follows as a corollary that the *granting* of such an application constitutes an adjudication in *favor* of the Government on the merits; and yet if the petition is granted arguments on the merits are invariably heard. Why should the court hear argument in cases which it has already adjudged? Third. It not infrequently happens that after granting the Government's application for *certiorari* the

court decides the case against the Government, or that after refusing a government application for *certiorari* the court afterwards adjudicates an identical question in the Government's favor in another case. The court has never before been charged with inconsistency in so doing. Fourth. This court has frequently asserted that it would take no case by *certiorari* unless the question involved was one of general public importance, whether or not the application was made by the Government. That rule is utterly inconsistent with the argument that the denial of the writ is an adjudication against the Government. *Non constat* that the court regarded the case as one not of sufficient general importance to varrant its consideration at the particular time when the application was made, to the detriment of other litigants whose cases would necessarily be delayed by the crowding of the court's docket with government cases taken on *certiorari*.

3. The decisions of the Circuit Courts of Appeals upon the question now presented are in direct conflict. In *Lynch* v. *Union Trust Co.* (C. C. A., 9th Cir.) 164 Fed., 161, it was decided against the Government. In *Westhus* v. *Union Trust Co.* (C. C. A., 8th Cir.), 164 Fed., 795, it was decided in favor of the Government. Is the Government to be charged with bad faith in taking an appeal to settle a question about which the Courts of Appeal differ with the result of establishing different rules of taxation in different jurisdictions? Does not the very fact of the conflict of decision conclusively prove that the question is not frivolous?

True, it is argued that the *Westhus case* may be put out of mind, first, because it was overruled by the action of this court in denying the petition for *certiorari* in the *Lynch case;* and, second, because it is claimed that the facts stated in the opinion in that case do not show (to put it briefly) that there was a tax upon any remainder not vested or any *payment* not due until after the repeal of the law. Nothing need be added to what has already been said in respect to the first contention. As to the second contention, the report of the *Westhus case* speaks for itself. It shows that the will involved in this case bequeathed to trustees all of the testator's residuary estate to be invested, etc., and the income therefrom to be divided into three parts, one of which (the only one involved in the case) was to be paid to Charles A. Madill; that this bequest to Madill was by the collector *treated as a life estate and taxed as such;* and that the court concurred in the collector's view that Madill's interest was *a life estate* vested in enjoyment prior to the repeal of the act. The court, at page 797, stated the first question in the case as follows:

> Was the interest of Charles A. Madill in the income of trust estate a contingent one not vested in enjoyment, and therefore, under the act of June 27, 1902, exempt from the tax?

And it answered the question thus:

> We think the bequest to Charles A. Madill was absolutely vested in enjoyment at the death of the testator. The right of the legatee to the enjoyment of the income was not post-

> poned to the end of a precedent estate, nor was it made to depend upon the happening of any contingency or uncertain event. A present and immediate right passed to him, not subject to devestment short of his death. The interest which passed by the will and in respect of which the tax was imposed was an ordinary life estate in the income of property held in trust, and the beneficiary was a person in being. The intervention of a trustee between the legatee and the physical handling of the corpus of the estate is unimportant in this connection. * * *

It is obvious therefore not only that the decision goes to the very point now in issue, viz, whether or not a bequest of property in trust with directions to pay over the rents, issues, and profits of it to a named beneficiary gives to the legatee a life estate or a mere annuity, but also that the question stated by the court to be the primary one in the case could not have arisen if the tax had only been assessed and collected in respect of the amount of income actually paid over to the beneficial legatee prior to the repeal of the law in 1902. The attempt to distinguish the case is therefore futile.

III.

The Government has also made and will rely on the point that in any event the right of this applicant is barred by limitation.

This question is by no means frivolous. It has already been held (*Vanderbilt* v. *Eidman*, 196 U. S., 480) that the act of 1902 merely declared the exist-

ing law respecting the taxability of contingent legacies. Appellants themselves assert this. (See brief, p. 3.) If, therefore, this tax was illegally exacted, the limitation period of two years fixed by Revised Statutes, section 3228, began to run on August 16, 1900, the date on which the taxes were paid (R., 28). But application for refund was not made until April 24, 1907 (R., 32), nearly seven years after payment of the tax. Further, the regulations adopted by the Treasury Department, pursuant to authority granted by the act of 1902, explicitly required that applications for refunds under that act should be made within two years (R., 34). If this regulation was valid, then this claim was barred, even if the right to make it began to run only at the date of the passage of the act of 1902, for the claim was not presented until nearly five years after that date. The question of the validity of this regulation is certainly not frivolous.

IV.

The Government has done nothing which can warrant the inference that it is exercising its right of appeal in this case in bad faith.

The lengthy affidavit filed as an appendix to the brief in support of this motion shows as clearly as anything can that the Treasury Department has consistently and persistently denied the right of appellees and others similarly situated to a refund. But it also makes an effort to show that in doing so the Treas-

ury Department has acted contrary to the advice and wishes of the Department of Justice. Such is not the case. The affidavit itself shows that the two departments were always in entire accord; but that after the denial of the Government's petition for *certiorari* in *Lynch* v. *Union Trust Co.* the then Acting Attorney-General acquiesced in that decision. Since reference to matters *dehors* the record seems to be in order, it may be stated that the acquiescence of the Acting Attorney-General was based on the ground that the Government had apparently exhausted every effort to get the question before this court for determination, and was therefore obliged either to make refund in *all* cases or *contest* all cases. Had the latter course been advised the inevitable result would have been that taxes collected in one circuit would have been refunded, while those collected in other circuits would not have been refunded, for there was already a conflict of decision in the Courts of Appeals. Such course was obviously undesirable, and there was nothing left but acquiescence in the refund. Later, however, it was suggested to the Treasury Department by the Department of Justice that the question might be tested in the Court of Claims, and the Treasury Department was advised not to make refunds, but to await the outcome of the proceedings which might be instituted in the Court of Claims. There has been, accordingly, not the slightest divergence of views between the two departments at any time, but both have always sought an adjudication by this court.

Aside from the contention that the questions involved in this case have been already disposed of by this court, the sole basis for the charge that the Government does not in fact expect or hope for a reversal of the Court of Claims' judgment is the alleged diversity of opinion as to the propriety of further litigating the question; and as no such diversity of opinion exists, the charge itself must fail.

GEORGE W. WICKERSHAM,
Attorney-General.

BARTON CORNEAU,
Special Assistant to the Attorney-General.

OCTOBER, 1910.

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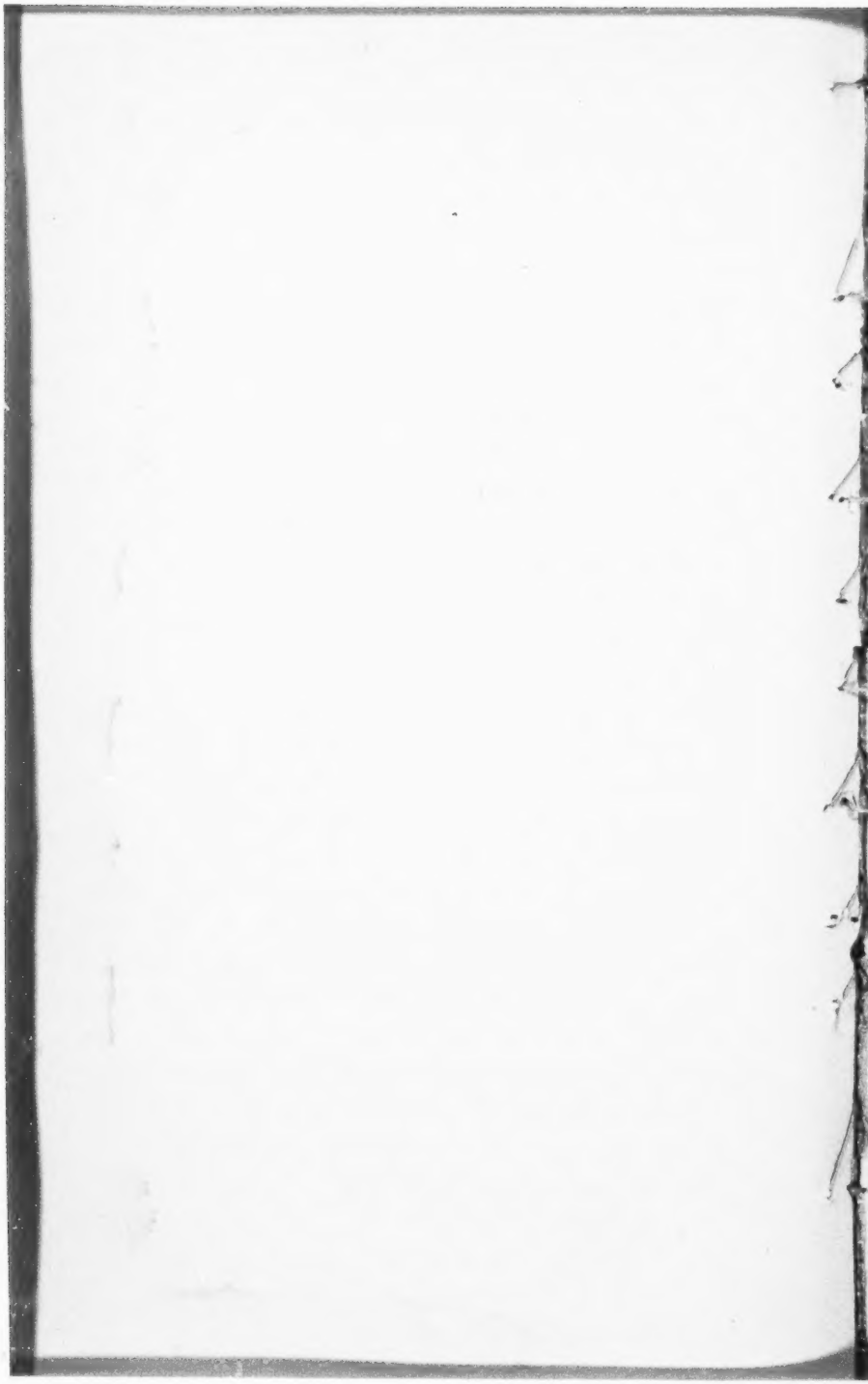

Office Supreme Court, U. S.
FILED.
OCT 14 1910
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 280

UNITED STATES, *Appellant,*

vs.

FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY) AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, Deceased.

REPLY BRIEF, ON MOTION TO DISMISS OR AFFIRM.

A. R. SERVEN,
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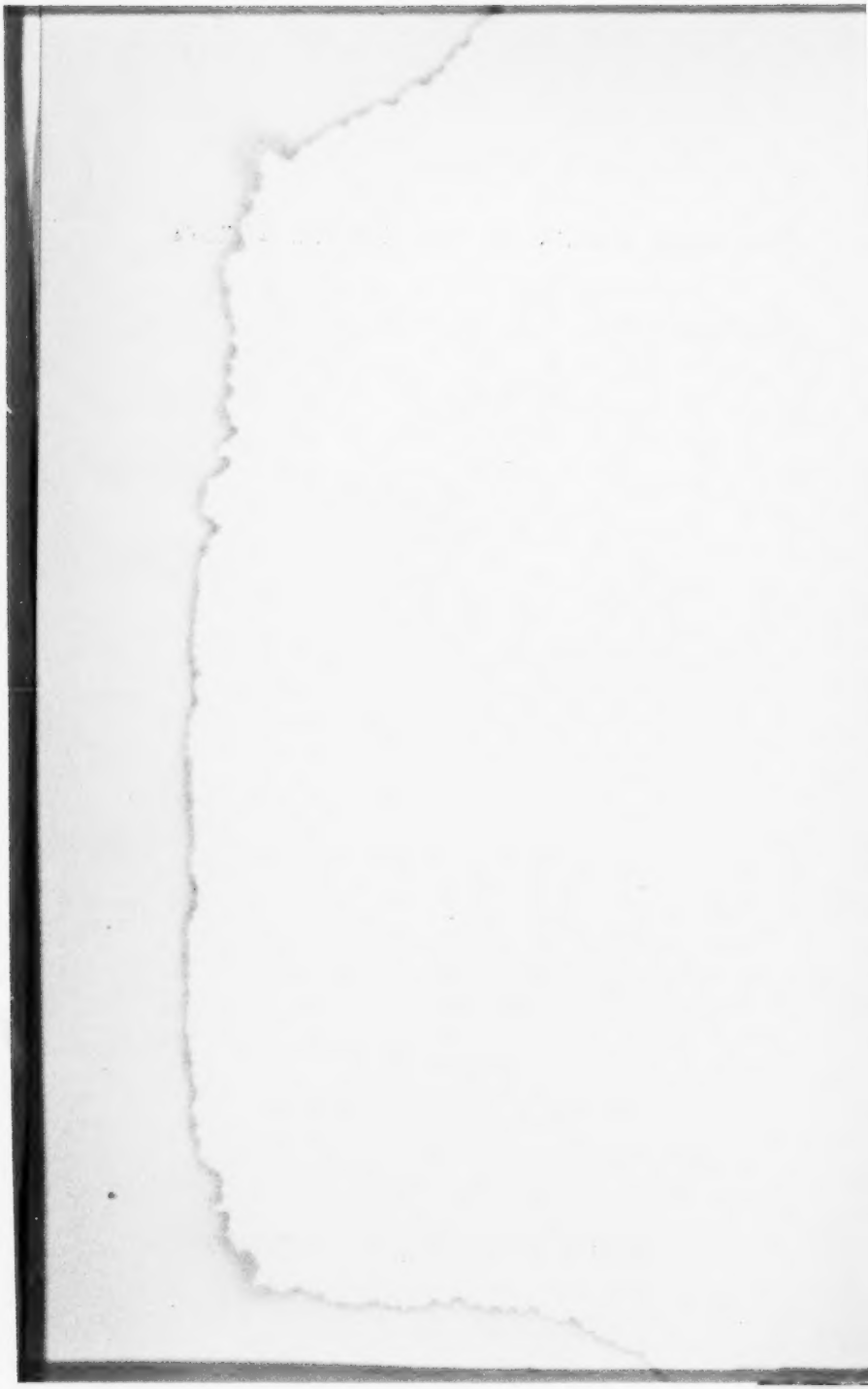
PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 548.

UNITED STATES, *Appellant,*

vs.

FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY) AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, Deceased.

REPLY BRIEF, ON MOTION TO DISMISS OR AFFIRM.

The brief of the learned counsel for the Government calls for but a few words principally in explanation of facts apparently misunderstood.

Concerning the applicability of the rules of this Court to the motion now made we have little to add to our principal brief. The affidavit in support of our brief (page 17) clearly discloses that appellee has been subjected to the

most persistent delay; that after the lapse of nearly three years the chief law officer of the Government advised the custodian of its funds that it was his duty to return these monies, that they were trust funds and that Congress had expressly directed that he return them. The refusal of this custodian is shown and further the significant absence of any representative of the Department of Justice in opposition to the merits of this case in the Court below. No word of explanation is offered by the Department of Justice for this absence.

This brief is written in no spirit of criticism of the officials of that Department for whom counsel entertain the highest regard. We are confident that in the numerous cases involving the Government which have been before this Court there have been many in which hardships and prolonged delays have been encountered the blame for which could not be laid to any particular official. Indeed each official concerned may have, as we believe in this case, acted in accordance with his highest sense of duty. Through changes in officials and other matters affecting official routine we submit a situation has resulted in this case which is one particularly appropriate for the summary action provided for by Rule 6, Clause 5 or, aside from such provisions, the exercise of a power inherently possessed by this Court.

Language has singularly failed us if it is true as counsel states on page 18, that "the affidavit itself shows that the two Departments were always in entire accord." Why then did the Secretary of the Treasury flatly refuse to follow the advice of the Attorney-General as contained in his letter of August 12, 1909? Why no defense on the merits by the Department of Justice in the Court below? Why was this defense made there solely by the Treasury Department? A great many more pertinent questions might be asked and naturally arise in perusing this affidavit.

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Apparently oblivious of the restrictive words "clear" and "actual" values as declared in Sections 29 and 30 of the taxing act to be the only subjects upon which the tax could attach, counsel nevertheless refers to the value of rights to receive something in the future as a proper subject of taxation. The value of such rights counsel states is "capable of *estimation* as a whole" by the use of mortuary tables and calculations. (Brief, p. 10.) This Court in Vicksburg & M. R. R. Co. vs. Putnam (118 U. S., 545), held such tables could never be employed to ascertain definite and actual results, but only as guides to a reasonable approximation. The Circuit Court of Appeals, in the case of Lynch vs. Union Trust Co. (164 Fed. Rep., 161, Certiorari denied, 214 U. S., 523), held to the same effect. See our principal brief, pp. 14 and 15.

The essential and vital points in our brief are lightly if not jauntily passed over. With Hamlet we exclaim:

> "There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy."

The only conclusion to be drawn from appellant's brief is that the Department of Justice is now urging that the advice given by it to the Secretary of the Treasury under date of August 12, 1909, to refund these moneys from the appropriation made by the Act of June 27, 1902 (32 Stat., 406), was utterly wrong and unsound. It should be remembered in this connection that each case cited in appellant's brief had been decided and published prior to August 12, 1909. It further appears that an earlier opinion of the Attorney-General must also fall. On pages 16 and 17 counsel state they will urge the defense of the statute of limitations provided by Section 3228, Rev. Stats.

Under date of March 11, 1907, the Attorney-General in an opinion to the Secretary of the Treasury said (26 Op. Atty. Gen., 194, 197):

"It cannot be held that claims arising under this act (Refunding Act of June 27, 1902) are barred, because of the failure of the claimants to present them for allowance within two years after the date of payment. The provisions of this statute are special and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S., Sec. 3228.) Suits brought to recover money due under this act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The act by its terms creates and acknowledges the obligation of the Government."

This opinion has been uniformly adhered to and followed by the Treasury Department since its rendition. The Comptroller of the Treasury has decided to the same effect. (Decs. of Compt. Treas., Vol. 13, p. 707.)

Whether the Secretary of the Treasury felt it his highest duty, last winter when facing a growing deficit, to decline to follow the advice of the Attorney-General in a matter which might mean the repayment to citizens of one million of their dollars, more or less, we cannot say, but we do know the advice was ignored, payment refused and as a direct result of this action appellee has been compelled and is now earnestly seeking the aid of this court.

Respectfully submitted,
A. R. SEVERN,
BARRY MOHUN,
Attorneys for Appellee.

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Supreme Court U. S.
FILED
OCT 27 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911, No. 280.

THE UNITED STATES, *Appellant*,

vs.

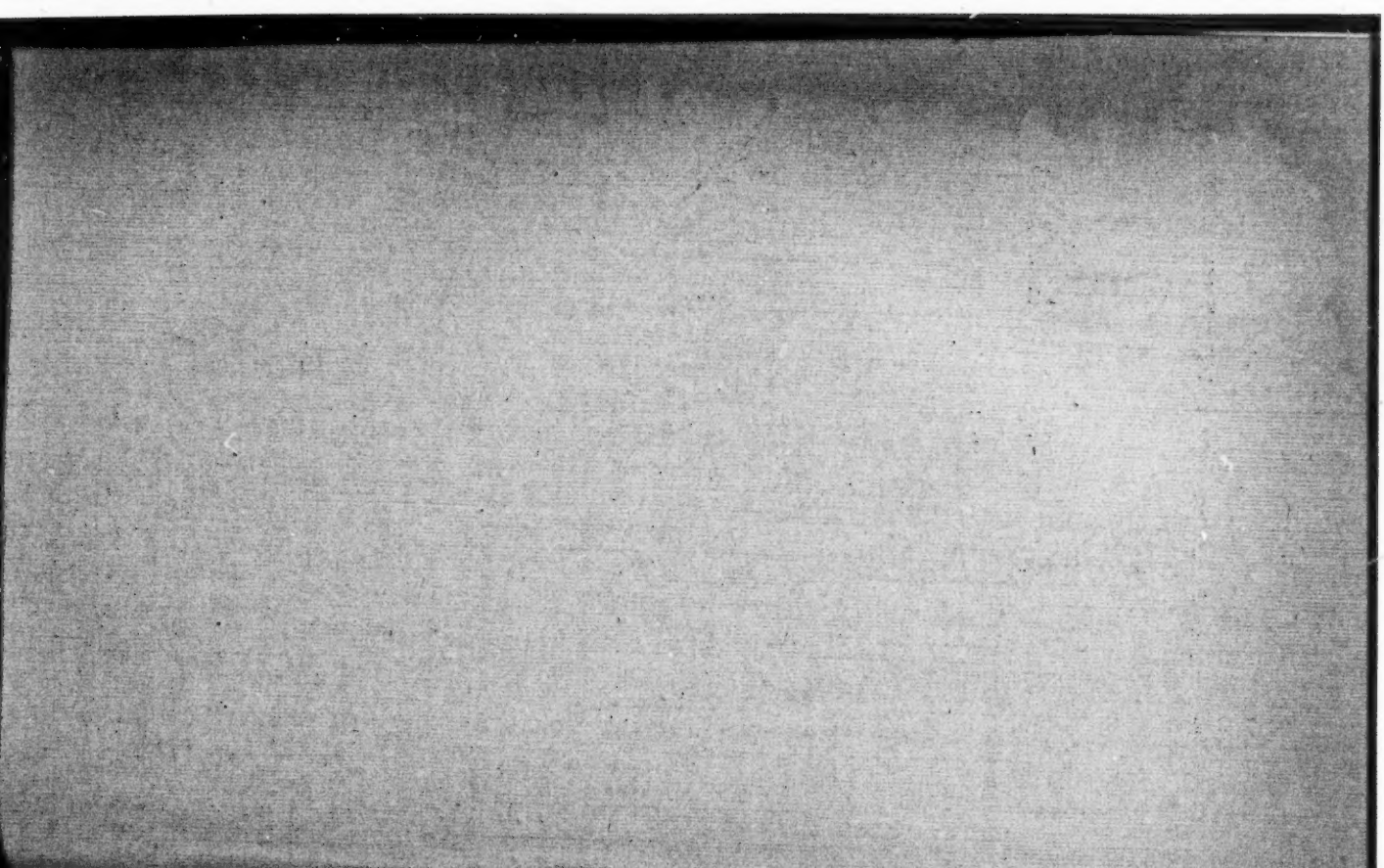
THE FIDELITY TRUST COMPANY (formerly the Fidelity Insurance, Trust and Safe Deposit Company), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF AMICUS CURIAE.

GEORGE P. MONTAGUE,
Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



IN THE

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF AMICUS CURIAE.

I.

This suit is brought under the third section of the Act of June 27, 1902, 32 Stat., 406, which is as follows:

> "Sec. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive

> share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The taxes that are directed to be refunded by the first provision of this section, it should be remembered, are the same as those that are forbidden by the second clause of the section to be collected in the future. So explicitly stated in *Vanderbilt vs. Eidman,* 196 U. S., 480, where the Court says (p. 500):

> "It is, we think, incontrovertible that the taxes which the third section of the act of 1902" (*i. e.*, the Act of June 27, 1902) "directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section and cause its provisions to produce inexplicable confusion. From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become

> ***vested in possession or enjoyment*** prior to the date named within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated and at the same time forbade like collections in the future."

The Court also says in that case (p. 500) that this statute was in a sense declaratory of the true construction of the Act of 1898. It should, then, be borne in mind that the Act of June 27, 1902, was not passed merely for the purpose of conferring a gratuity, but rather as an act of justice for the purpose of correcting the wrongful construction put upon the Act of 1898, and the amendments thereof, by the administrative officers, and providing for the refunding of such taxes as had already been, or should in the future be, thus illegally collected.

The question, therefore, that first presents itself for consideration is this:

What is the true meaning of the words "contingent beneficial interest not absolutely vested in possession or enjoyment" within the intendment of the Act of June 27, 1902?

For if such interests have been taxed, they have been illegally taxed, and this statute directs that any tax so paid, whether before or after the passage of the act, shall be refunded.

Much of the confusion arises from the special sense in which the word "contingent" is employed in the act. "Vested" and "contingent" are commonly used as words of antithesis. Here they are not, except in a qualified sense. For a vested interest may be contingent within the meaning of the act as well as a mere interest in expectancy. But so prone are we to think of vested and contingent interests as opposite in character, and to assume that if an interest is vested, it cannot, in any sense, be contingent, and that if

it is contingent, it cannot be vested, that we are apt to lose sight of the fact that such a conception is wrong in the present instance and leads to erroneous conclusions.

Take for example the case of a true vested remainder. Such an interest is indefeasibly vested in the *present* ("a vested remainder is where a *present* interest passes to a certain and definite person, but to be enjoyed *in futuro*," *Doe vs. Considine*, 73 U. S., 458, p. 474), but it is not a taxable interest (*Clapp vs. Mason*, 94 U. S. 589, *Mason vs. Sargent*, 104 U. S., 689), for the enjoyment is postponed to the future, and in that sense the interest is contingent within the meaning of the act. Therefore, merely to show that the interest is vested does not touch the issue, but simply begs the question. It must not only be technically vested in interest, but in the language of the statute, it must be "absolutely vested in possession or enjoyment" as well, otherwise it is contingent and non-taxable. The word "contingent" is contrasted not with "vested" alone, but with "absolutely vested in possession or enjoyment." Thus in *Vanderbilt vs. Eidman*, 196 U. S., 480, the Court says (p. 493):

> "The statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof."

And again on page 501:

> "It is undoubtedly true that both under the act of 1862 and the act of June 30, 1864, 13 Stat., 223, 285, there was an administrative construction by which vested interests, although unaccompanied with the right of immediate possession or enjoyment, were treated as at once taxable. Without entering into details on the subject, we content ourselves with saying that it is also true that the correctness of that construction was

in effect repudiated by legislative action (act of July 13, 1866, 14 Stat., 98, 140), and was, moreover, in substance, treated as unsound by the reasoning of the opinion in *Clapp vs. Mason*, 94 U. S., 589.

"Thus, by legislative action and judicial interpretation, it came to pass that the acts of 1862 and 1864 signified exactly what we now construe the act of 1898 to mean."

So long, therefore, and so far as the enjoyment is postponed to the future, to that extent no taxable legacy passes; and where the passing of the taxable legacy is in the future, or to the extent that the enjoyment of it is postponed to the future, the beneficial interest is contingent within the meaning of the act.

II.

The legacy in the present case consists of a bequest of income to a person for his natural life.

It is unnecessary to take time to point out the various distinctions that exist between a life estate in realty—a freehold estate—and a life estate in personalty in order to show that reasoning from the analogy of one to the other has little bearing on the matter in hand; nor is it necessary to consider the difference between an actual life estate in personalty and a life interest in income that may accrue in the future from stocks, bonds or other personal property, an interest not infrequently called, though really miscalled, a life estate in the thing itself. For both in law and in fact, one readily sees that there is an essential difference, not only as to the character of the interest, but as to the time of enjoyment as well, between the bequest of the thing itself to a person for life, and the bequest of certain bonds and stocks to a trustee to pay over to a third person the interest and the dividends, if any, as and when they accrue.

Omitting, therefore, such unnecessary discussion, let us see, in a case like the present of a bequest of income to a person for his natural life, just what is it that actually passes to the beneficiary at the time of the testator's death. It certainly is not income or anything tangible, for from the very nature of the bequest, it is only income accruing *after* the decease of the testator that passes by the gift. At the time of death, there is no such income in existence. What passes, therefore, is the mere naked right to receive future income, subject to a two-fold contingency, first, that there shall be such income to receive, and secondly, that the beneficiary shall be alive, when it accrues, to receive or enjoy it. Now this mere right to receive something in the future, even though the right to receive has become vested in the present, does not constitute a taxable legacy or succession within the meaning of the act. *Clapp vs. Mason,* 94 U. S., 589; *Mason vs. Sargent,* 104 U. S., 689. Nor is it any more a taxable succession because it is a present right to receive something that is beginning to accrue in the present, but which will have no actual existence until the future, and consequently is incapable of being possessed or enjoyed until the future. It is not the mere vesting of the right to receive that is taxable, but it is the absolute vesting in possession or enjoyment of the thing to be received that creates the tax; nor is this all, the thing so absolutely vesting in possession or enjoyment must have a value of more than ten thousand dollars—not merely a probable value, nor yet a fair value, nor even a market value—for a market value may be a mere speculative value —but "a clear value"; and how can anything that has not come into existence and that may never come into existence be said to have a "clear value" of $10,000?

The Government's contention is that this difficulty may be solved, and "clear value" readily ascertained by a resort to life or mortuary tables.

In the first place, such tables are properly used only to get at approximate values, and never when definite or actual values are obtainable. *Vicksburg and Meridian R. R. Co. vs. Putnam,* 118 U. S., 545, p. 556; *Lynch vs. Union Trust Co.,* 164 Fed., 161, 167; *Kahn vs. Herold,* 147 Fed., 575, 582.

Again, the act itself certainly contains no *express* provision authorizing the use of life tables, while the fact that the statute not only uses but reiterates the phrase "clear value," instead of saying "estimated or probable value," or even "market value," seems to negative any *implied* authority for the employment of such tables. And thus in *Herold vs. Shanley,* 146 Fed. (C. C. A.) 20, p. 24, we find the Court very pertinently saying that it fails to find any authority in the act for the use of mortuary tables. Moreover, it is only necessary to cite a few instances to show the confusion that would result from the use of these tables.

1. Suppose a testator leaves to his nearest heir-at-law, a nephew, unmarried, of the age of thirty years, the income, for his natural life, of property that, on a 4 per cent basis, yields an annual return of $100,000, remainder in fee to his (testator's) widow, in case the nephew dies without issue. The estimated value of such an interest by the tables (United States Internal Revenue Adjustment, 1898) would be more than a million seven hundred thousand dollars, and the legacy tax would exceed $76,500. Suppose, further, that the nephew, still unmarried, is killed in a railroad or other accident within a week after his uncle's death when less than two thousand dollars of income have accumulated. How can it be said that more than a million seven hundred thousand dollars in "clear value" ever became absolutely vested in the possession or enjoyment of the legatee? Further, how is the tax to be paid? The statute says it must be deducted from the par-

ticular legacy. In this case, the actual value of the legacy would be less than $2,000, whereas the tax would be more than $76,500. In such a case, would the legatee, or rather his estate, instead of receiving a legacy of $2,000, which is an amount exempt from taxation, not only forfeit this legacy, but also have to pay a tax of $74,500 in addition, that is, the amount of the tax in excess of the amount received from the legacy; or would the widow who is entitled to the entire remainder without paying any tax be obliged to pay this $74,500? (See *Kahn vs. Herold*, 147 Fed., 575, 582, 583; where the right to use life tables in a case of this kind is considered and denied.)

2. Take another case. Suppose a testator leaves to B, a stranger in blood, who has a life expectancy of less than five years, an annuity or income of $2,000 a year, and a like legacy to C, also a stranger, who has a life expectancy of thirty years. C's legacy, on a value estimated by the tables to be more than $34,000, pays a tax of more than $2,550, while B's legacy pays no tax at all. Suppose further, as might easily happen, that B survives the testator ten years, and that C dies at the end of two years. We should then have C, who actually possessed or enjoyed a legacy of only $4,000, paying a tax of more than $2,550, while B who actually received from his legacy $20,000 pays no tax at all.

3. Once more, take the case of several legacies of income, all of which according to the life tables, are exempt from paying a tax, but where each of the legatees survives his life expectancy, and actually receives, before the repeal of the act, income amounting to more than $10,000. Would the executor or trustee be justified in paying over income in excess of that sum without first deducting the proper tax?

4. Suppose the legatee of income had a long life expectancy according to the tables, but was an invalid or in

the last stages of a mortal disease, could that fact be shown to reduce the value of the legacy as estimated by the tables, and thus to reduce in amount or wholly avoid the tax? And conversely, in the case of a person of unusual health and vitality, would the collector be justified in taking such fact into consideration and thereby so enlarging the life expectancy as to make a legacy taxable that would not be taxable by the tables alone?

Even where the use of life tables is allowed, the general rule is that the condition of the individual's health and the particular circumstances of the case are also to be considered, and that the computation by the tables is subject to modification thereby.

Thus in *Rowley vs. London, etc., R. Co.*, L. R. 8 Exch., 221, it was held that an instruction authorizing the jury to find the term for which an annuity was to be purchased solely by reference to the average duration of life, without taking into account the state of health of the particular annuitant, was erroneous.

So, too, in *Vicksburg, etc., R. R. Co. vs. Putnam*, 118 U. S., 545, 557, *supra*, the Court below was reversed for a similar error in ruling, this Court saying:

> "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. *But what the jury in this case had to consider was the probable duration of this plaintiff's life.*"

5. Again looking at the statute from its penal side, would an action for penalties lie against an executor or trustee for a refusal to pay a tax on a legacy of income in a case where according to the life tables the legatee should receive income in excess of $10,000, but where he had, in fact, died before income to that amount had accrued?

6. Or, putting the question in a somewhat broader form,

suppose an executor had ignored, as not authorized by the act, the method of computation by life tables, but had conscientiously paid the legacy tax on incomes for life as and when they amounted to ten thousand dollars, and thereafter as the income accrued and became due, but had declined to pay any tax until the accrued income actually amounted to $10,000, could he be subjected to the penalties provided by the statute for the refusal by an executor or trustee to pay the tax:

First, when it was still doubtful whether the income would ever amount to $10,000?

Secondly, when it was certain, either by reason of the death of the legatee, or otherwise, that income to the amount of $10,000 could not accrue to the legatee?

III.

The case of *Eidman vs. Vanderbilt, supra,* has often been quoted in connection with cases like the present, and it has been argued with great force that that case fully sustains the appellee's contention in the present case. But while the two cases show certain close analogies, the main question presented for the Court's decision in the former case is so materially different from the question in this case that, notwithstanding the points of similarity between the two cases, it is thought that a too extensive reference to, or discussion of, the Vanderbilt decision will serve to obscure rather than illumine the issue in the case now under consideration.

In the *Vanderbilt* case the right of possession and enjoyment was postponed to the future. In the present case there was an immediate right of possession or enjoyment either at the time of the death of the testator, or at the expiration of the time for administering the estate. Again, in the *Vanderbilt* case, the property that was the subject

of the legacy was in existence at the time of death and was largely in excess of $10,000 in value. In this case, at the time of the testator's death, there was no property in existence on which the right to possess or enjoy could operate. The two cases are, therefore, the converse of each other. There is one point of similarity, however, and that is, that in neither of the cases does a *taxable* legacy accrue or pass till the future.

It is not the mere right to possess or enjoy something, whether in the present or future, that constitutes a taxable legacy, but that something must have a clear value of more than $10,000 at the time it passes into possession or enjoyment, and it seems impossible by any art of reasoning or any stretch of the imagination to arrive at the conclusion, in a case like the present of a bequest of future income, even though the income begins to accrue at and from the time of the testator's death, that, at the moment of death, a legacy of a clear value of $10,000 passes into the possession or enjoyment of the legatee. And if it does not pass at that time, it is submitted there is no way in which, and no time when, it can pass except as and when it accrues; and further, that until income to the amount of ten thousand dollars has actually accrued, no legacy has ever come into existence—much less passed into the possession or enjoyment of the legatee—to which the tax can attach inasmuch as all legacies for a less amount are by the statute expressly exempt from taxation.

Not only, therefore, does no taxable legacy pass at the time of death, but from the very nature of the case no such legacy can pass at that time. For if it could in any case pass at the time of the testator's death, one must be able to state some instance in which it would so pass when the legatee survived the testator only long enough to take title—five minutes or less, for instance. But it is obvious that no legacy of the taxable amount of more than $10,000, could

pass in such a case. Only so much income as had accrued in the intervening space between testator's death and the legatee's death would or could pass to the legatee or his estate, and plainly that would not amount to a taxable legacy.

Some further light may, perhaps, be thrown on this subject by considering the essential and vital difference between a legacy of income and a legacy of principal.

Suppose, for instance, that a testator gives to B a specific legacy of certain stocks and bonds having an actual value of $20,000, and to C the income on certain other stocks and bonds, which income, in consideration of C's life expectancy, is estimated by the tables to be of the same value, viz., $20,000. Suppose further that both B and C survive the testator but a single day. What then passes in each case? In the first case, inasmuch as the $20,000 in stocks and bonds are actually in existence at the time of the testator's death, the entire property passes through B to his estate. In the second case, no part of the legacy being in existence at the time of the testator's death, a mere naked right to something in the future passes at that time to C, and only such income as accrues between the time of the testator's death and C's death passes either to C or his estate—manifestly not a taxable legacy.

That income vests and can vest only when and after it accrues, is so familiar a proposition, that to say that income not only vests in a technical sense, but that it vests absolutely in possession or enjoyment, years before it accrues, and when it may never accrue, seems too manifest an error to require further comment.

IV.

In case of a legacy of income, the repeal of the tax has the same effect as the death of the legatee to prevent the tax from originally accruing if the income at that time does not exceed $10,000, as well as to exempt from taxation all income accruing thereafter.

In *Clapp vs. Mason, supra,* and *Mason vs. Sargent, supra,* it was decided that where the right to a succession vested and passed at the time of the testator's death, but where the passing of the taxable succession was deferred till the time of actual possession and enjoyment, a repeal of the act prior to the last mentioned event defeated the tax.

In the case of a legacy of income, it is submitted that no taxable legacy accrues or passes until income to the amount of more than $10,000 has actually accumulated, and that, applying the above principle, if the law is repealed before that event, no taxable legacy or succession ever arises. And further, that where the income amounts to more than $10,000 the tax attaches only to such income as has actually accrued before the repeal and that the repeal of the act operates as a discharge from the tax of all subsequently accruing income.

V.

The appellant, in its Brief in Opposition to the Motion to Dismiss or Affirm, says (p. 11):

> "There is no doubt of the taxability of the annuities. The only question is whether they shall be taxed as an entirety at their estimated worth when the right to receive them become indefeasible, or whether they shall be taxable monthly, quarterly, semi-annually, or annually, as they are actually paid over. The trouble, expense and difficulty of the latter course are obvious and should resolve any doubt against it."

First of all, it should be noted that according to appellant's own statement, such a tax would be a tax on "estimated" not on "clear" value, and for this we find no authority in the statute.

Again, on page 10 of the same brief, it is stated that

an annuity regarded as an entirety, is "an incorporeal hereditament," and is "treated for the purpose of descent as though it were real property."

The argument, therefore, that an annuity should be treated as an entirety for the purposes of the tax proves too much, for in that case, it would be a succession to real estate and not to personalty, and therefore would not be taxable at all under the act of 1898. The act of 1864, however, provided for a tax on successions to real estate, and there we find the term real estate defined as including "all lands, tenements, and hereditaments, corporeal and incorporeal." *Clapp vs. Mason,* 104 U. S., 589.

But though an annuity as an entirety may not properly be taxed under the act of 1898, yet as soon as the annuity or income is paid over, it becomes personal property, and such a legacy would seem to be within the purview of the statute, and as soon as it aggregates a sum in excess of $10,000 would then, but not till then, be subject to a legacy tax, on such annuity or income as had actually accrued.

Finally, the argument of convenience can have but little weight. For the mere *convenience* of the collector cannot nullify or destroy a *right* of the taxpayer. Furthermore, there is no real difficulty in paying the tax on income as and when it accrues. A very simple practical method would be as follows: Take the case, for instance, where the tax is $1.50 on each $100. The executor or trustee could safely pay the income to the legatee as it accumulated up to $10,000, reserving the last $150 for the tax in case the total income exceeded $10,000. On all income subsequently accruing, the executor could take out for the tax $1.50 on each $100, or 1½%, before paying the remainder over to the legatee, bearing in mind, moreover, that if the total income exceeds $25,000, before paying over the full $25,000, he should reserve enough to provide for a total tax of

$562.50, and thereafter on all subsequently accruing income up to $100,000, he should pay a tax of 2¼%, and so on.

This is a plain, direct method, and one, it is submitted, that conforms in all respects to the requirements of the statute. By it every dollar of annuity or income possessed or enjoyed by a legatee would pay its legitimate tax to the Government, while at the same time the rights of the taxpayer would be protected, and the taxing of annuities and incomes that had never come into existence in fact, and that consequently had never been either possessed or enjoyed by the legatee, would be avoided.

VI.

In conclusion, it is submitted that the collector had no right or authority to demand, nor had the executor a right to pay, any tax on annuities or incomes until the accrued income or the payable annuity amounted to more than $10,000, in clear actual value; and thereafter, only on such income or annuity as actually accrued prior to the repeal of the act, or the death of the legatee, whichever event happened first; and further that a legacy of income is a contingent beneficial interest within the meaning of the Act of June 27, 1902, because as the income does not come into existence or accrue till after the testator's death, its possession or enjoyment must of necessity be in the future, and must be contingent on the actual accumulation of income to an amount in excess of $10,000, as well as on the life of the legatee.

The cases bearing on the question have been so fully discussed in the other briefs, that it would be superfluous to review them here. Suffice it to say that the position outlined above has the support of the Court in the two leading

cases on the subject, viz: *Disston vs. McClain,* 147 Fed. (C. C. A., 3d Circuit), 114, decided July 9, 1906, Judge Gray delivering the opinion; and *Union Trust Company of San Francisco vs. Lynch,* 148 Fed., 49, decided by Judge Morrow in the 9th Circuit, August 23, 1906, and affirmed by the Circuit Court of Appeals for that circuit, October 5, 1908, in *Lynch, Collector, Appellant vs. Union Trust Company of San Francisco,* 164 Fed., 161; in both of which cases *certiorari* was denied by this Court.

It is true that in *Westhus vs. Union Trust Company of St. Louis,* 164 Fed. (C. C. A.), 795, decided November 4, 1908, the Circuit Court of Appeals for the 8th Circuit took a different view of the question, but the authority of that case can hardly fail to be somewhat impaired by the fact that, though it was decided more than two years after the elaborate decisions of Judge Gray in the *Disston* case and Judge Morrow in the *Lynch* case, no mention is found in the Court's opinion of either of those cases.

In the *Westhus* case, the Court seems to hold that the passing or vesting at the time of the testator's death of the present right to receive income,—such income starting, it should be noted, from nothing, and increasing, it may be, or *it may not* be, to the taxable amount of more than $10,000,—is the same thing as the immediate vesting of the income itself to an amount exceeding $10,000. It is not for a moment questioned that the right to receive the income as and when it accrues passes at the time of death, but the income itself cannot vest technically, much less "absolutely in possession or enjoyment," until such time as it has actually come into being, and from the very nature of a legacy of income that time is postponed to the future. An infinitesimal amount of income may, perhaps, be said to vest in the present (*i. e.,* immediately at the time of the testator's death), but income of the taxable amount of

more than $10,000, can by no possibility come into existence or vest until the future. Moreover, the very purpose and object of such a legacy is to provide for the future. Such is clearly the testator's intention. And where a legacy is not to be possessed or enjoyed until the future, whether such legacy vests in the present or not, it is a contingent beneficial interest within the meaning of the Act of June 27, 1902.

To assume that a legacy of income, no matter how large the estate may be from which the income is derived, vests or can vest in the legatee, at the moment of the testator's death, an interest of a clear value of more than ten thousand dollars seems to be an entire misconception of the nature of the gift. The controlling factor in determining the value of such a legacy is not the size of the estate but the life of the legatee. On the continuance as well as the existence of that life, the legacy is absolutely contingent; and unless the beneficiary survives the testator long enough for more than $10,000 of income to accumulate, no legacy of the taxable value prescribed by the statute passes or can pass to the legatee. Further, every such legacy is dependent upon the life of a *particular* individual, and in determining its "clear" value, not merely its probable value, the average length of life of a great number of persons of the same age as the legatee is wholly foreign to the purpose.

GEORGE P. MONTAGUE,
Amicus Curiae.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, APPELLANT,
v.
THE FIDELITY TRUST COMPANY (formerly the Fidelity Insurance, Trust and Safe Deposit Company), as executor and trustee under the last will and testament of Walter H. Tilden, deceased. } No. 280.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This was a suit in the Court of Claims for the recovery of $4,286.31, part of the amount collected by the United States as an inheritance tax under the provisions of sections 29 and 30 of the war revenue act of June 13, 1898 (30 Stat., 464), upon a bequest to Mary Wadleigh Stokes of the income for life of the residuary personal estate of Walter H. Tilden.

The right to recover is predicated upon section 3 of the act of June 27, 1902 (32 Stat., 406), which provides:

> SEC. 3. That in all cases where an executor, administrator, or trustee shall have paid, or

> shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes," and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, *so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two.* And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two.

The facts of the case as found by the Court of Claims (R., 27 et seq.) are substantially as follows:

Walter H. Tilden departed this life on the sixteenth day of March, 1899, his last will and testament containing the following provisions (R., 28, 29):

> Twelfth. I give and bequeath to Mary Wadleigh Stokes, a niece and namesake of my deceased wife, all my silver plate, cut glassware, pictures, books, and ornaments of every description contained in my dwelling house,

No. 1636 Green Street, Philadelphia, and also the free use and occupancy of said house and all the furniture and utensils therein so long as she may wish to reside therein. * * *

Fifteenth. *I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real and personal, unto The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, its successors and assigns, in trust, to hold the same, either as at present invested, or in such securities as to my said trustee may be deemed safe, and to collect and receive the rents, interest, dividends, and income therefrom, and pay the same over, less all proper charges thereon, to the said Mary Wadleigh Stokes, in quarterly payments, during all the period of her natural life,* and in case her mother, Frances Wadleigh Stokes, should survive her daughter, then the said The Fidelity Insurance, Trust and Safe Deposit Company, trustee, shall pay to her one thousand dollars per annum, in quarterly payments of two hundred and fifty dollars ($250.00) each, during all the period of her natural life, and the said The Fidelity Insurance, Trust and Safe Deposit Company shall, after the decease of the said Mary Wadleigh Stokes and her mother, hold what remains of the principal of my residuary estate and property upon the further trust to grant, convey, assign, and transfer the same to the Home for Aged Couples of the City of Philadelphia. * * *

The Fidelity Trust Company (formerly The Fidelity Insurance, Trust and Safe Deposit Company) qualified as executor under the will (R., 30).

After the death of the testator, the finding of facts states, the collector of internal revenue for the 1st District of Pennsylvania notified the trust company to make return to him of the legacies and bequests passing under the will. On June 8, 1900, the company made a return in writing, in which it was stated that the residuary estate from which Miss Stokes received the income for life amounted to $120,303.94, and that the specific legacy made by the twelfth clause of the will was worth $500. The clear value of the entire legacy (specific and income) was fixed at $74,678.68, upon which was assessed an inheritance tax of $5,600.90, which was paid on August 16, 1900 (R., 30).

In ascertaining the present value of such bequest, the collector of internal revenue, in accordance with the instructions of the Commissioner of Internal Revenue, used and adopted certain mortuary tables, in the preparation of which the rate of 4 per cent per annum was the rate of interest arbitrarily assumed (R., 31).

Up to July 1, 1902, the claimant, as executor and trustee, had paid Mary Wadleigh Stokes, in income from the residuary estate, $17,027.59, and had also delivered to her the specific legacy named in the twelfth paragraph of the will, valued at $500, making a total of $17,527.59. The tax upon this amount at $7.50, the rate of taxation, is $1,314.59, which, deducted from the amount of tax actually collected, $5,600.90, leaves a balance of $4,286.31, for the recovery of which this suit was brought (R., 32).

On April 24, 1907 (nearly five years after the passage of the refunding act), claimant made application to the Secretary of the Treasury for the refundment of $5,600.90, paid as aforesaid, or such part of said sum as was paid as taxes upon income, which, under the terms of said will, had not been and could not have been paid the said Mary Wadleigh Stokes until subsequent to July 1, 1902 (R., 32).

May 11, 1907, the attorneys for claimant were notified by the Acting Commissioner of Internal Revenue of the rejection of their claim "on the ground that the tax was collected upon a life estate passing under the will of testator and vesting in the possession and enjoyment of the legatee prior to July 1, 1902, and that the tax having been paid August 16, 1900, and the claim not having been filed until April 24, 1907, allowance is barred by the two years' limitation imposed by section 3228, R. S." (R., 33).

The Government demurred to claimant's petition, which set up the facts substantially as above stated, upon the ground of want of jurisdiction in the Court of Claims and because the facts alleged did not constitute a cause of action (R., 18).

The Court of Claims, in an opinion by Judge Barney (R., 18), overruled the demurrer, and upon the facts as found rendered judgment in favor of the claimant for the amount claimed in its petition (R., 34). From that judgment the United States appealed to this court (R., 34).

ASSIGNMENT OF ERRORS.

(1) The Court of Claims erred in overruling the demurrer of the Government and giving judgment for the claimant.

(2) The Court of Claims erred in holding, in substance, that the bequest to Mary Wadleigh Stokes of the income for life in the residuary estate of Walter H. Tilden was a "contingent beneficial interest" within the meaning of the refunding act of June 27, 1902, and that said interest had not become vested prior to July 1, 1902, beyond the amount of the income which had been paid over to her at that time.

ARGUMENT.

I.

The bequest to Mary Wadleigh Stokes is not a "contingent beneficial interest" within the meaning of the refunding act of June 27, 1902.

The tax in question having been voluntarily paid, claimant's right to recover the sum claimed must rest entirely upon the refunding act of June 27, 1902. This is not disputed, the petition being predicated entirely on that statute.

The question, therefore, is not whether the taxes in question were erroneously collected, but whether the act of June 27, 1902, directs their refundment.

What taxes does the act of June 27, 1902, direct the Secretary of the Treasury to refund?

Only taxes collected on "*contingent beneficial interests* which shall not have become vested prior to July 1, 1902."

What is a contingent beneficial interest?

A comprehensive definition is, an interest dependent upon its vesting, absolutely or technically, upon the happening of some uncertain event.

What was the interest bequeathed Mary Wadleigh Stokes by the fifteenth paragraph of the will?

The present right to the income of the residuary personal estate of the testator, less certain charges.

Is such an interest contingent?

Not according to the definition of any known authority.

Bouvier defines a "contingent interest in personal property" thus (vol. 1, p. 422):

> It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dict.

It will be observed that the interest of the widow in the income for life is treated as vested. So this court, in *Vanderbilt* v. *Eidman* (196 U. S., 480), recognizes that a present right to enjoy the income of property is a vested and indefeasible interest.

Neither of the cases upon which the Court of Claims relies (*Disston* v. *McClain*, 147 Fed., 114; *Lynch* v. *Union Trust Co.*, 164 Fed., 161) holds that a legacy of this character is a "contingent beneficial interest." It was not necessary that they should, because neither of those suits was under the refunding act, but each was a suit to recover taxes paid under protest, upon the ground that they were illegally collected. Here, the primary, and indeed the sole inquiry, is whether the taxes were collected upon a "contingent beneficial interest." Unless the claimant brings himself within the grant his case must fall, even though the taxes were erroneously collected.

In the *Lynch* case the court practically concedes that the right to the income was not a "contingent beneficial interest," for it says (164 Fed., 166):

> * * * It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. *It may, indeed, be conceded that this is a correct characterization of the estate conferred.*

The *value* of such an interest, not its *vesting*, depends upon the uncertainty of human life; but every interest in real or personal property is more or less uncertain in its value, which may fluctuate with the passage of time or the exigencies of the market.

The refunding act does not deal with *values*, but with contingent *interests*, and because the value of a *vested* interest is dependent upon the uncertainty of human life is no authority for its refundment under that act.

It follows that, as the interest taxed in this case was not a "contingent beneficial interest," it is not within the purview of the refunding act.

II.

The history of the refunding act confirms its language and shows that the act was not intended to apply to taxes collected upon interests of the kind in question.

Is there anything in the history of the refunding act which justifies the conclusion that Congress used the phrase "contingent beneficial interest" in any

other than its usual sense, and intended to authorize the refundment of taxes collected upon legacies of the kind in question beyond the amount of the income received prior to July 1, 1902?

Absolutely nothing. On the contrary, the history of the act shows clearly that Congress used that expression in its ordinary sense, and intended to cover only such *interests* as depended for their vesting in possession or enjoyment upon the happening of some uncertain event.

The history of the act of June 27, 1902, is referred to in *Vanderbilt* v. *Eidman* (196 U. S., 480). The court there construed sections 29 and 30 of the war revenue act of June 13, 1898, as taxing only contingent interests which had vested absolutely in possession *or* enjoyment. It referred to the original construction placed upon such act by the internal revenue department, as shown by the taxes collected and paid voluntarily in that case and the case of *Knowlton* v. *Moore* (178 U. S., 41), upon legacies like the one here in question, as illustrations of the correctness of its construction, and pointed out that it was not until the amendatory act of March 2, 1901, that remainders were attempted to be taxed prior to their actual vesting. Referring, then, to the refunding act of June 27, 1902, the court said that it was declaratory, and in fact a legislative affirmance of the original construction given by the internal revenue department to the act of 1898, and added that no reason for the enactment of the refunding act had been suggested other than the change of practice

mentioned, by which remainders were taxed prior to their actual vesting. Upon this point the court said (196 U. S., 497):

> Indeed, in accord with its text and in harmony with the principles of construction expounded in the cases just cited, the act of 1898 was primarily construed by the officers charged with its administration as taxing only beneficial interests where the right to possess or enjoy had accrued. The rulings of the Internal-Revenue Department to this effect were without deviation for several years.
>
> The practice followed in carrying out the statute was illustrated by the assessment which was made in the case considered in *Knowlton* v. *Moore* (178 U. S., 41), as exhibited in the schedule on page 44 of the report of that case. It was also by this construction that the tax in this case was originally assessed only upon the beneficial interest which was being enjoyed by Alfred G. Vanderbilt.

The schedule in *Knowlton* v. *Moore*, referred to by the court in this case, shows that the present value of the life interest of Countess Sierstorpff under the will of Edwin F. Knowlton was estimated according to United States tables and taxed upon that basis.

Continuing, the court said (196 U. S., 497–8):

> The change of construction was made because the administrative officers deemed it was required by the amendment of March 2, 1901, to the act of 1898. 31 Stat., 946. This is shown by a ruling made by the Commissioner

of Internal Revenue on October 17, 1901, in which it was said (Treasury Decisions, Internal Revenue, vol. 4, p. 209):

"This office formerly held that the tax on reversionary interests was payable when the beneficiaries entered into the possession and enjoyment of their legacies.

"The amendment to section 30 of the war-revenue law, approved March 2, 1901, which went into effect July 1, 1901, necessitated a change in this ruling, and on July 20, 1901, this office ruled that reversionary interests which are vested are taxable on their present worth."

The case therefore reduces itself to this: Did the amendatory act of 1901 enlarge the act of 1898 so as to cause that act to embrace subjects of taxation which were not included prior to the amendment?

After stating that the amendments made by the act of 1901 did not have the effect of "justifying the construction that Congress intended by adopting them to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were therefore not subject to taxation under the original act," the court refers to section 3 of the refunding act of June 27, 1902, and says (p. 500):

In view of the provision for refunding, we see no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2,.

> 1901, and which was only departed from by the administrative officer under a misconception of the import of that amendatory act. *There is no suggestion that any prior practice prevailed in the enforcement of the act of 1898, calling for the enacting of the refunding clause, except the mistaken construction placed on the amendatory act of 1901.*

The legislative history of the refunding act confirms what was said by the court in *Vanderbilt* v. *Eidman* as to the reason for its enactment.

The act of June 17, 1902, had its origin in House bill No. 13204, 57th Cong., 1st sess., introduced March 29, 1902. This bill became section 1 of the act, and had no provision for a refund of taxes paid on contingent bequests, and passed the House without any such provision. (35 Cong. Rec., 3439, 4506.) On April 30, 1902, Senator Jones, of Arkansas, introduced Senate bill No. 5547 "to provide for refunding taxes on contingent interests in legacies and distributive shares of personal property which have been paid before such interests became vested" (35 Cong. Rec., 4855), and this bill was referred to the Senate Committee on Finance. House bill No. 13204, on reaching the Senate, was referred to this same committee May 19, 1902, and reported out of the committee on June 16, 1902, with Senator Jones's bill added as an amendment. (35 Cong. Rec., 5620, 6838.) It passed the Senate June 17, 1902, so amended, without discussion. (35 Cong. Rec., 6935.) Subsequently, on June 19, 1902, the question pending as to whether

the House should concur in the Senate amendments, Mr. Payne, of New York, said (35 Cong. Rec., 7087):

> Mr. SPEAKER. These amendments of the Senate were fully considered by the Committee on Ways and Means yesterday, informally, of course, because the bill had not been referred to the committee; and I was directed unanimously by the committee to ask unanimous consent of the House to consider the amendments in the House, and to concur in the amendments. * * * The third section, which is the second amendment of the Senate, as numbered, provides for a refund of the tax collected on contingent beneficiary interest in legacies taxed by the law, and also repeals it upon any future contingent beneficiary interest after the first of July. *The Internal-Revenue Commissioner has lately decided that the tax under the law must be exacted on contingent beneficiary interests although they take effect on the first of July and become vested after that date.* As we have repealed all these legacy taxes, the committee thought it fair and just to repeal this part of it, and not to require those who receive legacies which are to be paid after the first of July—some of them twenty and thirty years from now—to be taxed on those legacies, and not to require trustees and executors to pay such tax.

The bill passed immediately, without further discussion.

It will be observed that Mr. Payne's statement was in the nature of a report of the Committee on Ways and Means and is therefore proper to be considered

in determining the purpose of the amendment referred to. (*American Net & Twine Co.* v. *Worthington*, 141 U. S., 473–474; *Holy Trinity Church* v. *United States*, 143 U. S., 463; *Dunlap* v. *United States*, 173 U. S., 75.) This statement shows conclusively that the only reason for the refunding provision was the change of practice by the Commissioner of Internal Revenue by which contingent remainders were taxed before they actually vested in possession or enjoyment, as suggested by this court in *Vanderbilt* v. *Eidman*.

It is difficult, therefore, to understand how it can be contended that the bequest in this case is a "contingent beneficial interest" within the meaning of the refunding act, without doing violence to its language, repudiating its history, and impugning the intelligence of the court and counsel in *Vanderbilt* v. *Eidman*, where the similar legacy to Alfred G. Vanderbilt is recognized and treated as absolutely vested in actual enjoyment.

III.

The interest bequeathed Mary Wadleigh Stokes not being a "contingent beneficial interest" within the meaning of the refunding act of June 27, 1902, it is unnecessary to inquire whether it vested absolutely in possession or enjoyment prior to July 1, 1902.

The above proposition seems unanswerable. The interest bequeathed Mary Wadleigh Stokes is not, it has been shown, a "contingent beneficial interest" within the meaning of the refunding act. That

being so, it is clearly immaterial whether or not it was vested absolutely in possession or enjoyment within the meaning of the statute. Yet this is the question that the Court of Claims seems to consider to the absolute exclusion of the primary inquiry whether such an interest is a "contingent beneficial interest" within the meaning of the statute.

But, it may be argued, if the interest here in question is not vested absolutely in possession or enjoyment it must be a contingent interest within the meaning of the refunding act. Assuming this to be so, it would also be true that, if such an interest is not a contingent interest within the meaning of the statute, it must be one which is vested absolutely in possession or enjoyment. Therefore, by demonstrating, as we have done, that such interest is not a contingent one within the meaning of the statute, we have proved, beyond the need of further argument, that it has vested absolutely in possession or enjoyment.

IV.

A bequest of the income of personal property of which the legatee had the right of present enjoyment was taxable under the act of June 13, 1898.

This inquiry is really unnecessary, because the right of claimant to recover depends, as above stated, entirely upon the refunding act, and if the legacy in question was not a "contingent interest" within the meaning of that act, as we think has been shown, it is immaterial whether or not it was correctly taxed under the act of June 13, 1898. However, we think

it can readily be shown that such legacies were properly taxed under that act.

Sec. 29 of the act, which imposes the tax, provides (30 Stat., 464):

> That any person or persons having in charge or *trust*, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State of Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:
>
> First. Where the person or persons entitled to *any beneficial interest* in such property shall be the lineal issue, etc.

It will be seen from these and other provisions of this section, as well as of section 30, which prescribes the method of collecting the tax, that a tax is imposed

upon "*any* beneficial interest" arising from personal property passing by will under the intestate laws of any State or Territory, etc., under the conditions and limitations specified in the act as to the value of the property and the relationship of the parties.

That the right to receive the income from personal property for life is a "beneficial interest" therein cannot be doubted.

The *right* to receive the income of personal property is something separate and distinct from the actual receipt of such income. It is an *interest* in the property which is manifestly capable of alienation as an entirety, and therefore susceptible of valuation, just as a widow's right of dower.

Life estates in personal property are as well recognized now as life estates in realty, and are governed largely by the same rules.

The rule is thus stated in A. & E. Ency. of Law (1st ed.), vol. 18, p. 410:

> The doctrine of interests or estates in expectancy has come at last to be applied with much the same force to personal as to real property, and interests for life or years may be created in various ways followed by an expectant estate in the nature of a remainder or reversion. This is frequently accomplished by means of trusts and settlements.

The ancient common law rule was that an assignment of a chattel to one for life would convey the property absolutely, inasmuch as no estate could be created therein. (Schouler on Personal Property

(1873), p. 164). The same author, commenting on the change in the rule, says (ib., p. 163):

> But the rule which thus discriminated between things real and things personal began to relax as these two species of property assimilated more closely in value and importance to one another; and in modern times, when mercantile enterprise has developed new sources of wealth and new species of permanent investments, the force of the old objections to limitations of personal property is well-nigh spent; and failing the reasons, the rule must fail. If real estate is valuable to-day, so is personal property; if the one can be preserved intact, so to a great extent can the other; if the enjoyment of rents and growing crops for years or for life is valuable, not less so is the receipt of interest and dividends for a like period.

Manifestly no one would think of contending that a life interest in real estate was not a beneficial interest in such property, possessing a value independent of the actual rents and profits received at any particular time.

Page on Wills says (p. 686):

> Since the abolition of the rule in Shelley's case, a bequest of the income of personal property with remainder over to the heirs and children of the first taker passes merely a life estate to the first taker and not an absolute interest.

In *Smith* v. *Bell* (6 Pet., 68), which involved the construction of a will purporting to give the widow of the testator a life interest in his personal estate

with a remainder over, Chief Justice Marshall, speaking for the court, said (p. *78):

> The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle in our law.

And referring to the case before the court, he said (p. *83):

> The testator unquestionably intended to make a *present* provision for his wife, and a future provision for his son.

The act of June 13, 1898, therefore, in taxing "any beneficial interest" arising in personal property, must necessarily have had in contemplation the well-settled rule as to interests therein. So, in *Knowlton* v. *Moore* (178 U. S., 41) Mr. Justice White, in delivering the opinion of the court, referred to the statute as "clearly recognizing that there may be partial and distinct interests in each item of personal property, such as an *interest for life* in one person with a remainder in another."

The cases of *Clapp* v. *Mason* (94 U. S., 589) and *Mason* v. *Sargent* (104 U. S., 689) show that bequests of life interests in both real and personal property were taxed without question under the inheritance tax act of 1864, the taxation of remainder interests which had not actually vested alone being held illegal. As pointed out by the court in *Knowlton* v. *Moore*, the act of 1898 is almost an exact reproduction of the act of 1864.

The decisions of this court as to the subject of the tax and when it is imposed are conclusive of the

proposition that a legacy of the income of personal property was taxable the moment such beneficial interest was acquired—that is to say, upon the death of the testator, if the legatee immediately succeeded to the beneficial use or enjoyment of such *right*.

The subject of the tax is thus stated in *Hertz* v. *Woodman* (218 U. S., 205, 219):

> Now, what is the property, right, or thing which is made subject to the tax? This has been most conclusively answered by *Knowlton* v. *Moore* (178 U. S., 41, 56), where the section in question is construed as laying a tax upon the transmission, or the *right* to succeed to a legacy or distributive share or gift in contemplation of death, passing after the act.
>
> For reasons and upon grounds not necessary to be restated it has been also conclusively decided in *Vanderbilt* v. *Eidman* (196 U S., 480), that the tax or duty does not attach to legacies or distributive shares *until the right of succession* becomes an absolute *right* of immediate possession *or enjoyment*. It was therefore held in the case cited that a legacy *upon conditions which might never happen* was not subject to the tax or duty prior to the time, if ever, when the *right* of possession *or enjoyment* should become absolute.
>
> To repeat then: The subject of the tax or duty exacted by section 29 is the *right of succession* which passes by death to a vested beneficial *right of* possession or *enjoyment* to a legacy or distributive share.

And the conclusion reached in that case as to when the tax was imposed, was thus stated (pp. 219–220, 224):

> Upon the facts certified the right of succession which passed by the death of the testator was an absolute *right* to the immediate possession and enjoyment, a right neither postponed until the falling in of a life estate, as in *Mason* v. *Sargent*, 104 U. S., 689, nor subject to contingencies, as in *Vanderbilt* v. *Eidman*, *supra*. No further event could make their title more certain nor their possession and enjoyment more secure. The law, then unrepealed and in full force, operated to fasten, *at the moment this right of succession passed by death*, a liability for the tax imposed upon the passing of every such inheritance or right of succession. * * * The liability attaches at some time before the time for payment. But the liability for the payment of the tax exacted under section 29 of the act of June 13, 1898, *accrued or arose the moment the right of succession by death passed to the defendants in error*, and the occurrence of no other fact or event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired.
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> * * * * *
>
> The conclusion we reach is, that upon the passing by death of a *vested right to the immediate* possession or *enjoyment of a legacy or distributive share*, there was imposed the tax or duty exacted upon every such *right of succession* which was saved by the saving clause of the repealing act.

This is in line with the ruling in *Dollar Savings Bank* v. *United States* (19 Wall., 227, 240), that the tax was imposed by the statute and no assessment was necessary to determine the bank's liability.

Bearing in mind the subject of the tax and the time it became taxable, there can be no doubt as to the taxability of a legacy of the income of personal property the moment the legatee succeeds to such interest. The tax, as defined by this court, is upon the *property right* or *interest* to which the legatee succeeds, and it attaches at the moment of succession. If the vesting of such *interest* depended "upon conditions which might never happen," it was not taxable. But if such interest had passed absolutely and indefeasibly to the legatee, as is the case here, it was taxable.

That this is true results inevitably from the ruling in *Hertz* v. *Woodman* "that upon the passing by death of a *vested right* to the *immediate* possession or *enjoyment* of a legacy or distributive share there was imposed the tax or duty exacted upon every such right of succession which was saved by the saving clause of the repealing act." Such ruling is totally inconsistent with the idea that a bequest of the income of personal property to which the legatee immediately succeeded was not taxable until and only to the extent that such income might be paid to him. The tax is on the succession to the right to enjoy the interest transmitted, not upon the amount of benefit actually derived therefrom. That such right has a value independent of the income actually received, seems to require no argument.

V.

The administrative construction placed upon the act of 1898 having practically received both legislative and judicial confirmation, and being in accord with that which prevailed without question under the act of 1864, it should not now be departed from.

The legacy tax act has been uniformly construed by the officers charged with its enforcement as taxing all beneficial interests for life or years as an entirety, whether held in trust or otherwise.

As early as December 20, 1898, the Commissioner of Internal Revenue was called upon to rule on this question, and held (T. D. 20445) that—

> Where a testator leaves a specific sum to trustees to hold in trust for the benefit of a grandson during his life, and to pay him the net income of such fund, the present worth of the life interest will be determined by approved tables, and tax must be paid thereon.

This construction, primarily adopted in the enforcement of the act, was followed without deviation during the existence of the law and has been consistently maintained by the executive officers, as is shown by the rejection of the claim in this case.

This interpretation of the act was also, as above stated, in accordance with the construction given the act of 1864, as illustrated by the case of *Mason* v. *Sargent* (104 U. S., 689), a construction which had never been questioned.

That great weight should be given to the long and consistent construction placed by an executive department upon a statute which it was its province to

administer, is a well-settled rule of statutory construction.

In *Pennoyer* v. *McConnaughy* (140 U. S., 1, 23) the court said:

> The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it.

And in *Schell* v. *Fauché* (138 U. S., 562, 572) it was said that—

> "in all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The weight to be given departmental construction is greatly increased when Congress in reenacting the law fails to indicate in any way its disapproval of the settled construction to which it is thus regarded as giving an implied approval. The amendatory act, approved March 2, 1901, reenacted the legacy tax provisions of the act of June 13, 1898, without any change to meet or alter the executive construction theretofore given to the provisions of said act.

Referring to the amendatory act of 1901, the Supreme Court, in *Vanderbilt* v. *Eidman* (196 U. S., 498) said that—

> no word is found in the amendatory act importing an intention to change the admin-

> istrative construction which had theretofore prevailed from the beginning. On the contrary, the amendatory act reiterated without alteration the provisions found in the original act as to possession or enjoyment and beneficial interest and clear value. Indeed the amendatory act contained new provisions not expressly found in the original act, supporting and adding cogency to the prior administrative construction; * * *

and referring to the act of June 27, 1902, the court said (ib., 500) that they saw—

> no escape from the conclusion that this statute was in a sense declaratory of what we hold was the true construction of the act of 1898, and which, as we have seen, had prevailed prior to the amendment of March 2, 1901, and which was only departed from by the administrative officer under a misconception of the import of that amendatory act. * * * The act of 1902 was, therefore, a legislative affirmance of the construction given to the act of 1898, prior to the amendment of 1901.

VI.

The use of mortality tables for the purpose of determining the present value of vested interests in personal property was authorized and proper.

This question is immaterial because the repealing act is not a general statute for the correction of errors and would afford no remedy in the case of a vested interest even if its value was improperly determined.

But the use of mortality tables for the purpose of determining the value of a vested interest for life or years was clearly proper.

The act of 1898 does not undertake to provide how the "clear value" of legacies or distributive shares shall be determined. It leaves this in the first instance to the executor or administrator, but if they fail to comply with the law, by making the proper return, the collector is authorized to act.

It will be observed that in this case, as in *Knowlton* v. *Moore* and *Vanderbilt* v. *Eidman*, the trustees made out the return and fixed the "clear value" of the legacy of the income from the residuary estate. This being so, it is difficult to see by what right they now question the correctness of the return.

In fact, it does not appear that the taxability of such legacies, according to the methods stated, was ever seriously questioned until after the decision of this court in *Vanderbilt* v. *Eidman*. Then, although the taxability of such legacies was clearly recognized and practically conceded in that case, the language of the court with reference to the vesting of *contingent remainders* was seized upon for the purpose of proving that a bequest of the income of property for life or years was not actually vested in possession or enjoyment, because its *value* depended upon the legatee's expectancy of life. In fact, the whole argument in support of claimant's contention rests upon a misapplication of what this court said in *Vanderbilt* v. *Eidman* with reference to the vesting of a contingent remainder.

In making out the return, the trustee used the mortality tables promulgated by the internal revenue bureau. Naturally, as the statute did not prescribe how the clear value of a legacy should be determined, the collector, if called upon to act, was justified in using ordinary commercial methods.

The practice of using such tables was well established. They had been used under the inheritance-tax act of 1864 for a similar purpose, they are used by the courts in determining the value of dower rights, and, as pointed out by appellee in its motion to dismiss or affirm this case filed at the last term (pp. 12–13), such tables and such methods are expressly authorized by the inheritance-tax laws of Maine, Massachusetts, New York, and other States, the rate of interest being fixed at 5 per cent in some of the States, while the internal-revenue bureau conservatively made it 4.

In *Dunbar* v. *Dunbar* (190 U. S., 345), the court while recognizing the difficulty of estimating how long a widow would remain unmarried, said:

> * * * *A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables.* Mr. Justice Bradley, in *Riggin* v. *Magwire* (15 Wall., 549), speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841.

> The fifth section of that act gave the right to prove "uncertain and contingent demands," but it was held that a contract such as above described was not within that section.
>
> It was remarked by the justice in that case that if the contract had come within the category of annuities and debts payable in future, *which are absolute and existing claims, the value of the wife's probability of survivorship after death of her husband might have been calculated on the principles of life annuities.*

Life interests in personal property having been taxed without question under the act of 1864, it is to be assumed that Congress intended to authorize not only the taxation of such interests but the method theretofore employed in determining the tax when it enacted the act of 1898 in substantially the same terms as the act of 1864.

VII.

The Authorities.

The authorities are somewhat divided on the question as to the taxability, under the act of June 13, 1898, of a legacy of the income of personal property for life or years according to its estimated present value. Such a tax has been upheld in the Second and Eighth Circuits.

The decision of Judge Ray, in *Title Guarantee & Trust Co.* v. *Ward* (164 Fed., 459), will be found to be most carefully reasoned and persuasive. The case was affirmed by the Circuit Court of Appeals for the Second Circuit (184 Fed., 447)

upon the strength of that opinion, and this court denied an application for a writ of certiorari therein at the last term (220 U. S., 620)

In that case the testator bequeathed the residue of his estate, real and personal, to trustees, in trust (164 Fed., 461, 462)—

> to hold, invest, maintain, and manage during the lives of those two of his children who, surviving him, should be the youngest of his children at the time of his death, and for such longer time as the laws of New York would permit, and upon the trusts and for the purposes: (1) To raise and set aside certain sums to satisfy certain payments directed by preceding clauses of the will; (2) to set aside and invest a sum that would secure an annual income of $12,000 to his wife; (3) from the income not otherwise disposed of to pay $6,000 per annum to each of his four children, naming them; (4) the remainder of the income to be used during the life of the trust to pay liens on the Central Park apartment buildings (part of his residuary estate) until paid off, and then to pay the remaining income to such four children, paying to the issue or devisee of any child dying before the termination of the trust the parent's share, and "distributing equally among the surviving children the share of any who may have died without issue and intestate;" (5) on the termination of the trust to satisfy any lien on such apartment building and thereupon to pay, transfer, and convey the residuary estate in equal parts, share and share alike, to the said children, or to their respective

heirs, legatees, devisees, next of kin, executors, administrators, or assigns.

The Circuit Court held that the tax, except as to the part set aside for the use of the widow, was properly assessed, in view of its conclusions (ib., 469, 470):

> * * * that the estates of the children in the residuary were vested estates, as distinguished from technically vested estates; that the right to possession or enjoyment is not subordinated to any uncertain contingency; that the children came immediately into the possession and beneficial enjoyment of the rents and income subject to certain charges; that the Supreme Court, in *Vanderbilt* v. *Eidman*, has decided that the act of 1898 means the same as the act of 1862, and is to be given the same construction as to the time when the tax should be assessed and becomes due and payable; and that that act expressly provided that "the duty imposed by this act shall be paid at the time when the successor, or any person in his right or his behalf, shall become entitled in possession to his succession, or to the receipt of the income or profits thereof."

In the case just cited, construing section 29 of the act of 1898, Judge Ray said (p. 465):

> The words are: "Intended to take effect in possession or enjoyment." I am of opinion that when the estate is absolutely vested in ownership, with absolute right of disposition, and is accompanied by the absolute right to enjoyment of the income, so far as given by

the will, present possession or present right of possession of the property itself is unnecessary, and that such interest is presently taxable. I do not think that in this connection "possession" means the same as "enjoyment." If the gift of the principal is absolute, then either possession thereof or the right to enjoy the income so far as given is all-sufficient. Neither the statute nor the language of the Supreme Court reads "possession and enjoyment," but "possession or enjoyment." If the personal property is absolutely given by will by an indefeasible title, and is accompanied by a present right to the possession and use of the income so far as given by the will, possession of the principal for a limited time by the trustee does not defer the imposition and collection of the tax until the time for payment over.

Applying the rule contended for, had the war continued and the act remained in force, the Government would have received no present, substantial benefit from the tax, as many, if not all, testators, while giving absolute title and the entire income beneficial use, would have deferred payment over of bequests until a future day. The legatees named in the residuary clause of the will of James Jennings McComb took vested estates in the residuary estate, as contradistinguished from technically vested estates, and beneficial interests, capable of absolute and certain valuation. Their absolute title was not uncertain, or liable to be defeated by the happening of any event or in any contingency.

Vanderbilt v. *Eidman*, *supra*, decides nothing to the contrary. Repeating, the court, at pages 498 to 501 of 196 U. S., page 331 of 25 Sup. Ct. (49 L. Ed., 563), refers to the fact that estates vested in possession or enjoyment were taxable. The language is not, as claimed by the plaintiff here, "vested in possession and enjoyment." And the court, at page 501 of 196 U. S., page 338 of 25 Sup. Ct. (49 L. Ed., 563), refers to *Clapp* v. *Mason* (94 U. S., 589; 24 L. Ed., 212), as interpreting act July 1, 1862, c. 119, 12 Stat., 432, 485, levying war taxes, and in substance says that that act, as interpreted in *Clapp* v. *Mason*, *supra*, meant exactly what the act of 1898, now under consideration, means. Turning to *Clapp* v. *Mason* (94 U. S., 592; 24 L. Ed., 212), and to act June 30, 1864 (sec. 137, c. 173, 13 Stat., 289), there quoted, we find the taxes were properly and legally levied, and became due and payable "when the successor or any person in his right or his behalf should become entitled in possession to his succession, or to the receipt of the income or profits thereof."

This makes clear what the court meant in *Vanderbilt* v. *Eidman* by "vested in possession or enjoyment"; that is, under both acts, that of 1862 and 1898, the tax was assessable and payable when the donee of the gift came into actual possession of the gift or of the income or profits.

In *Westhus* v. *United States* (164 Fed., 795) the Circuit Court of Appeals for the Eighth Circuit reached a like conclusion, upholding the tax.

In that case the testator died leaving a will whereby, after payment of his debts and certain specific legacies, he bequeathed all of his property in trust, with directions that the net income of the trust estate, after a deduction not material here, should be divided into three equal parts, called A, B, and C, respectively. It was further provided that the trust company should pay the net income represented by part C, which was the only part involved in the suit, to the testator's son, Charles A. Madill, at least semi-annually during his lifetime, the remainder after his death to other persons upon various contingencies. The tax was collected in 1905, after the passage of the act of June 27, 1902.

The Circuit Court of Appeals stated that these questions arose upon the facts of the case and the statutes of Congress (164 Fed., 797):

> (1) Was the interest of Charles A. Madill in the income of the trust estate a contingent one not vested in enjoyment, and therefore, under the act of June 27, 1902, exempt from the tax?
> (2) When was the tax "imposed"?

In discussing the first question, the court said (164 Fed., 797–8):

> We think the bequest to Charles A. Madill was absolutely vested in enjoyment at the death of the testator. The right of the legatee to the enjoyment of the income was not postponed to the end of a precedent estate, nor was it made to depend upon the happening of any contingency or uncertain event. A present and immediate right passed to him, not sub-

ject to divestment short of his death. The interest which passed by the will and in respect of which the tax was imposed was an ordinary life estate in the income of property held in trust, and the beneficiary was a person in being. The intervention of a trustee between the legatee and the physical handling of the corpus of the estate is unimportant in this connection. True, the precise amount of the income depended upon the amount or value of the corpus of the trust property, the definite ascertainment of which might have to await the payment of debts and the preparation of schedules, but such an uncertainty no more makes a bequest of income contingent than does the fluctuation of rates of interest upon the invested funds of the trust estate. The income bequeathed began to accrue from the day the testator died. In determining the character of a bequest, whether contingent or vested, whether immediately to be enjoyed or the enjoyment of which is postponed, regard should be had to the terms of the will evidencing the purpose of the testator, and not to the adventitious circumstances connected with the administration of the estate which are not mentioned in the will as affecting the testamentary intent; otherwise, through their measurable control of such circumstances, power would rest with executors or trustees to determine when, if ever, the passing of an estate by will should be subject to the payment of a tax imposed by act of Congress. That the legatee was not given control over the income in advance of the actual payment thereof to

> him did not render the bequest contingent nor prevent it from vesting in enjoyment within the lines of restriction imposed by the testator. The effect of restrictions of that character would be upon *the value* of the interest which the legatee secured, and concerning that there is no controversy here.

This case was followed in *Chouteau* v. *Allen* (170 Fed., 412).

In *Shanley* v. *Herold* (141 Fed., 423), the Circuit Court, District of New Jersey, held, as stated in the head note—

> A bequest to a person when he reaches a certain age is contingent, and not taxable under War Revenue Act June 13, 1898, C. 448, * * * before such age is reached; but, where the legatee is in the meantime to receive the income therefrom, he has a present beneficial interest which is subject to the tax, to be based on a computation of the amount he will receive before reaching such age or during his expectancy of life, if shorter than such time.

This case was affirmed by the Circuit Court of Appeals, Third Circuit, without discussion of this question.

Claimant relies upon the cases of *Disston* v. *McClain* (147 Fed., 114), decided by the Circuit Court of Appeals for the Third Circuit, and *Lynch* v. *Union Trust Co.* (164 Fed., 161), decided by the Circuit Court of Appeals for the Ninth Circuit. The first is the case of the bequest of annuity, which

the court expressly distinguished from a bequest of the income of personal property, treating it as a series of legacies. The *Lynch* case is rested upon the *Disston* case, the court ignoring the distinction mentioned. As above pointed out, neither of these cases involved a construction of the refunding act, and both, as to the question involved, are based upon a misinterpretation of what this court said in *Vanderbilt* v. *Eidman* as to the vesting of contingent remainders.

CONCLUSION.

It may not be improper to say in conclusion that the question here involved is one of great importance to the Government. Several million dollars, we are advised by the internal-revenue officers, have been collected upon legacies of the kind in question. To be more specific, according to the annual report of the Commissioner of Internal Revenue, dated November 1, 1910, quoted in the motion to advance this case filed by appellee at the last term, the remainder of the legacy-tax claims held awaiting the decision of this court in this case aggregate more than $2,700,000.

The refunding act of June 27, 1902, is an act of grace, and should be construed accordingly. The rule as to the imposition of taxes, by which any doubt is resolved in favor of the taxpayer, does not apply. The taxes have been imposed, collected, and turned into the Treasury, and all this voluntarily and without protest on the part of the taxpayers. They are seeking now to obtain benefit from the bounty

of the Government. Clearly, the act should not be construed so as to deplete the Treasury to the extent indicated unless there is some real reason to suppose that Congress intended to relieve such bequests from taxation. It is yet to be shown that Congress had any such purpose. On the contrary, it appears that the act has already subserved the only purpose for which it was enacted—to relieve remainder and reversionary interests which had not actually vested at the time of the repeal of the war revenue act.

For the reasons stated, the judgment of the Court of Claims should be reversed.

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OCTOBER, 1911.

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Filed ... Term, ... F. I. C. O.
OCT 27 1911
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 280.

THE UNITED STATES, APPELLANT,

vs.

THE FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. THOMAS, DECEASED, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

AMPLIFIED BRIEF FOR APPELLEE.

A. R. SERVEN,
H. T. NEWCOMB,
MORRIS F. FREY,
R. W. JOYCE,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 280.

THE UNITED STATES, APPELLANT,

vs.

THE FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

AMPLIFIED BRIEF FOR APPELLEE.

Statement of the Case.

This appeal is from a judgment of the Court of Claims awarding to the appellee, who was the plaintiff in that court, the sum of four thousand two hundred and eighty-six dollars and thirty-one cents ($4,286.31) adjudged to be due to it, in its capacity as executor and trustee under the will of Walter H. Tilden, deceased (Record, p. 34), on account of

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a certain gift or donation for its relief, and an appropriation therefor, both contained in that portion of section 3 of the act of Congress entitled "An act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the act of June 13, 1898, and for other purposes," approved on June 27, 1902 (32 Stat., 406), which reads as follows:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902."

The foregoing is the first sentence of the section. The next sentence, which constitutes all the balance of the section, reads:

> "And no tax shall hereafter be assessed or imposed under said act approved June 13, 1898, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

As will be more fully shown at a later point in the brief (see pages 16, 17), it has already been settled, in Vanderbilt *vs.* Eidman (196 U. S., 480, 500), that the word "vested," in the sentence first quoted, means the same as the phrase "absolutely vested in possession or enjoyment," in the second sentence.

The payment which, acted upon by the statute of June 27. 1902, gave rise to appellee's right to receive the amount of the judgment herein from the Treasury of the United States was claimed by the collector of internal revenue for the first district of Pennsylvania under color of the legacy tax provisions contained in sections 29 and 30 of the act of June 30, 1898. The whole payment, made on August 16, 1900, amounted to $5,600.90, but only $4,286.31, the amount of the judgment, was claimed by appellee in the suit from which this appeal has arisen. The former sum was demanded and collected on the alleged "present worth," at the time of the death of Walter H. Tilden, of the right of Mary Wadleigh Stokes, under his will, to receive during her lifetime the income from his residuary estate, less, however, an annuity of $500.00, and plus a specific legacy valued at $500.00. Tilden died on March 16, 1899 (Record, p. 29). Between that date and July 1, 1902, the date on which the repeal of the tax took effect, Mary Wadleigh Stokes received, under his will, the specific legacy valued at $500.00 and $17,027.59 income from the trust fund, and no more. This was the whole amount which she became entitled to receive prior to the latter date (Record, p. 32). The material portions of the will are as follows:

> "Twelfth. I give and bequeath to Mary Wadleigh Stokes, a niece and namesake of my deceased wife, all my silver plate, cut glassware, pictures, books, and ornaments of every description contained in my dwelling house, No. 1636 Green street, Philadelphia, and also the free use and occupancy of said house and all the furniture and utensils therein, so long as she may wish to reside therein. It is my will that no inventory or appraisement be filed or account be taken of the articles contained in my said dwelling house.
>
> "Fifteenth. I give, devise, and bequeath all the rest, residue, and remainder of my property and estate, real and personal, unto The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, its successors and assigns, in trust, to hold the same, either

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as at present invested, or in such securities as to my said trustee may be deemed safe, and to collect and receive the rents, interest, dividends, and income therefrom, and pay the same over, less all proper charges thereon, to the said Mary Wadleigh Stokes, in quarterly payments, during all the period of her natural life, and in case her mother, Frances Wadleigh Stokes, should survive her daughter, then the said The Fidelity Insurance, Trust and Safe Deposit Company, trustee, shall pay to her one thousand dollars per annum, in quarterly payments of two hundred and fifty dollars ($250.00) each, during all the period of her natural life, and the said The Fidelity Insurance, Trust and Safe Deposit Company shall, after the decease of the said Mary Wadleigh Stokes and her mother, hold what remains of the principal of my residuary estate and property upon the further trust to grant, convey, assign, and transfer the same to the Home for Aged Couples of the City of Philadelphia, provided, however, that the said home shall by legal process have its corporate title and name changed to that of the Tilden Home for Aged Couples of the City of Philadelphia; but in case the said Home for Aged Couples of the City of Philadelphia should be unable or unwilling to accept the devise and bequest aforesaid made to it under the condition above named, then and in that case the said The Fidelity Insurance, Trust and Safe Deposit Company shall convert my residuary property and estate aforesaid into money, and divide the same according to its best judgment, and in such sums as it may deem best, among the most worthy charitable institutions of the city of Philadelphia, without regard to denominational or sectarian affiliation or connection, except that among the institutions intended in such case as above recited to be so benefited shall be the Hospital of the Protestant Episcopal Church of Philadelphia, Christ Church Hospital of Philadelphia, and also the before named Home for Aged Couples of the City of Philadelphia.

"Sixteenth. I hereby constitute and appoint The Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia to be the executor of this my last will

and testament, and I direct that the commissions chargeable by my said executor and trustee shall be at the rate of three per cent upon the capital and income of said estate and no more." (Record, pp. 28, 29).

An effective codicil to the will provided as follows:

"Whereas in the sixth paragraph of my will I have bequeathed to Elizabeth C. Tilden the mortgage of four thousand dollars upon her property on Fourth street, South Boston, Mass., and directed the cancellation thereof.

"And whereas the said Elizabeth C. Tilden has sold the said property since the making of my will, now I do revoke the bequest and direction with regard to the said mortgage in the said paragraph, and I do further direct that the trustees of my residuary estate shall, out of the income thereof, during the continuance of the trust provided for in the 15th item of my said will, pay to the said Elizabeth C. Tilden the sum of five hundred dollars annually in quarterly payments, and upon her death, during the continuance of the said trust, out of the income thereof to pay the said amount to her two daughters Adeline and Ella, or the survivor of them, and upon the death of the survivor of said annuitants, the said annuity shall go as is directed for the rest of the income of my residuary estate. All the annuities directed in my said will and codicil shall run from the date of my death and shall be free of collateral inheritance tax. In all other respects I confirm my will." (Record, p. 29).

The residuary estate, placed in trust, was valued at $120,303.94 (Record, p. 30). Mary Wadleigh Stokes, at the time of Tilden's death, was twenty-nine years of age (Record, p. 31). The calculation upon which the collector based his claim of a tax of $5,600.90 was fundamentally dependent upon the following arbitrary assumptions on his part:

First. That the trust fund would produce income at the rate of precisely four per centum per annum (Record, p. 31).

Second. That Mary Wadleigh Stokes would live exactly 30.205 years longer, that is, 30 years, 2 months and 15 days, or, more specifically, until May 31, 1929 (Record, p. 31).

On the basis of the foregoing arbitrary assumptions, four per centum of $120,303.94 being $4,812.15, and deducting from this estimated income the annuity of $500.00 payable to Elizabeth C. Tilden, the collector claimed the right to collect the tax as though Mary Wadleigh Stokes had been left an annuity of $4,312.15, which would actually be paid to her during a period of exactly 30.205 years (Record, p. 31), from March 16, 1899, the actual date of Tilden's death, to May 31, 1929, the assumed date of her own death, on the last day of each year (Record, p. 14) and not quarterly, as the will required the income actually earned to be paid to her, *and payable to her estate in case of her death before May 31, 1929, the end of the assumed period.* The sum of 17.20_{\frac{225}{1000}}$ placed at interest at the rate of four per centum per annum, with interest compounded annually, would provide for the payment of an annuity of $1.00 at the end of each year for such a period of 30.205 years, and at the end of that time the whole fund, both principal and interest, would be exhausted. In other words, an annuity of $1.00 payable at the end of each year during an "expectation of life" running for 30.205 years has a "present worth," calculated arbitrarily on a four per centum rate, of 17.20_{\frac{225}{1000}}$. This latter sum, multiplied by 4,312.15, the number of dollars in the collector's arbitrary estimate of Mary Wadleigh Stokes' annual income from the trust fund, produces $74,178.68. To $74,178.68, thus arbitrarily obtained, the collector added $500.00, the value of the specific legacy, and, the tax rate for $100.00 being $7.50, he multiplied the sum $74,678.68 by the rate and, as this gave a product of $5,600.90, he demanded and collected that amount (Record, p. 31).

Appellee's claim is that the tax could not properly have been collected upon more than the sum to which Mary Wad-

leigh Stokes actually became entitled prior to the repeal on July 1, 1902, which sum, including therein both actual income from the trust fund and the value of the specific legacy, was $17,527.59. At the rate of $7.50 per $100.00 the tax on this amount would have been $1,314.59. Appellee's contention was fully sanctioned by the Court of Claims, its judgment being for the difference between $5,600.90, the sum collected, and $1,314.59, the sum so calculated to have been due, or $4,286.31.

The appellee is the identical corporation named in the foregoing as executor and trustee, its name having been duly changed from The Fidelity Insurance, Trust and Safe Deposit Company to the Fidelity Trust Company.

Questions at Issue.

Upon the foregoing record there are two questions, and two questions only, which could arise. These questions are:

First. Did the Court of Claims have jurisdiction in the premises?

Second. Was the amount of the judgment collected from the plaintiff below on account of a contingent beneficial interest which had not become absolutely vested in possession or enjoyment prior to July 1, 1902, within the intendment of the act of June 27, 1902?

Both of the foregoing questions were, in fact, raised by the Government by its demurrer to plaintiff's petition below; both were decided in the affirmative by the Court of Claims; both are opened, subject to the findings of fact by that court, by this appeal, and both will be discussed in this brief.

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ARGUMENT.

The questions in issue will be discussed herein in the order in which they are stated above. That is to say, it will first be shown that the Court of Claims was right in holding that it had jurisdiction to award relief in this case, and, second, that the plaintiff was entitled to the relief indicated by the judgment.

Jurisdiction.

Appellant, whose counsel has apparently abandoned the view that the Court of Claims was without jurisdiction in this case, as his brief contains no reference to that question, argued below that, as this cause of action grew out of the administration of the Spanish War Revenue Act (30 Stats. L., 448), the court had no jurisdiction, because a complete system for the adjudication of claims based on the illegal or erroneous collection of such taxes is established by the provisions of sections 3220, 3226, 3227, and 3228 of the Revised Statutes, as follows:

> "SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty: *Provided,* That where a second assessment is made in case of a list, statement, or return which in the opinion of the collector or deputy collector was false or fraudulent,

or contained any understatement or undervaluation, such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement, or return was not false or fraudulent, and did not contain any understatement or undervaluation.

"SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided,* That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued: *Provided,* That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

"SEC. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any

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> sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June six, eighteen hundred and seventy-two may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date."

Attention is here called to section 3 of the act of June 27, 1902 (32 Stats. L., 406), as follows:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

The jurisdiction of the Court of Claims was challenged as to any claim for illegally or erroneously collected internal taxes. Section 1 of the act of March 3, 1887 (24 Stats. L., 2505), gives the Court of Claims jurisdiction to hear and determine all claims founded upon the Constitution of the

United States or any law of Congress, except for pensions. In Christie Street Commission Co. *vs.* United States, 136 Fed. Rep., 326, 331, a case brought under jurisdiction granted by section 2 of the act of March 3, 1887, *supra*, concurrent with that of the Court of Claims, the court said:

> "A claim to recover back internal taxes illegally exacted under a misconstruction of the war-revenue law of 1898 is a claim founded upon a law of Congress, within the true meaning of the act of March 3, 1887; and it may be enforced by an action directly against the United States under that act after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort."

In Dooley *vs.* United States, 182 U. S., 222, 228, 45 L. Ed., 1074, 1080, this court said:

> "In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the non-payment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained."

Hence we submit that the Court of Claims has jurisdiction of a claim for any taxes illegally collected arising out of the administration of the internal revenue laws under the provision in the Fifth Amendment to the Constitution of the

United States to the effect that private property shall not be taken for public use without just compensation.

It was also contended that section 3 of the refunding act approved June 27, 1902, *supra,* must be considered part of the general system provided by sections 3220, 3226, 3227, and 3228 of the Revised Statutes, *supra,* for the recovery of internal taxes illegally or erroneously collected; hence that proceedings under said section 3 are subject to all the limitations of these sections of the Revised Statutes, and consequently the Court of Claims did not have jurisdiction of this cause, as the claim for refund was not filed with the Commissioner of Internal Revenue, nor was the suit instituted in that court within two years next after the cause of action accrued, as provided by those sections. In reply it is respectfully suggested that while the sections referred to contain the general provisions for the recovery of internal taxes wrongfully collected, yet long after they were enacted the act of June 27, 1902, became law. This subsequent legislation, it will be noted, provides an entirely different system for adjudicating the particular class of claims falling within its provisions, and also provides a special appropriation for the payment of such claims entirely independent of that provided by section 3689, Revised Statutes, for the payment of such general claims for internal taxes illegally collected as may be adjudicated by the Commissioner of Internal Revenue. This act of 1902 contains no limitation as to the time within which to present claims thereunder or to enforce payment thereof by the institution of suit, nor does it authorize the Secretary of the Treasury to prescribe any such limitations. Hence the Court of Claims seems to have jurisdiction of this cause whether or not section 3 of the act of June 27, 1902, is a part of the system for the recovery of internal taxes illegally or erroneously collected as provided by said sections of the Revised Statutes.

Attention is invited to the following, which relate to proceedings under similar conditions:

"This section limits no time within which application must be made to the Treasury for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. Whenever the owner of the land or his legal representatives should apply for the money, it was the duty of the Secretary to draw his warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the Treasury for an indefinite period of time without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time. * * * The general rule is, that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own and not subject to the trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que* trust in such manner that he is called upon to assert his rights, the statute of limitations will begin to run against him from the time such knowledge is brought home to him, and not before. Merriam *vs.* Hassam, 14 Allen, 522; Baker *vs.* Whiting, 3 Sumn., 486; Kane *vs.* Bloodgood, 7 Johns. Ch., 90; Att'y Gen'l *vs.* Federal Street Meeting House, 3 Gray, 1; Bright *vs.* Legerton, 2 De G., F. & J., 606; Wedderburn *vs.* Wedderburn, 2 Keen, 749" (United States *vs.* Taylor, 104 U. S., 216).

"No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the Government. The ordinary rules for the maturity of negotiable paper do not control. Congress has directed that the money already once appropriated and checked against shall be placed in the Treasury and held subject to the call of the party for whose benefit it has been so appropriated and checked" (U. S. *vs.* Wardwell, 172 U. S., 48).

See also Lawton *vs.* United States, 18 Ct. Cls., 595; Ravenel *vs.* United States, 23 Ct. Cls., 192; Wayne, Adm., *vs.* United States, 26 Ct. Cls., 274; Thatcher *et al. vs.* United

States, 149 F. R., 902, 13 Dec. Compt., 707; Daly Case, 26 Op. Att'y Gen'l, 194.

It was also insisted that under section 3 of the act of June 27, 1902, the Secretary of the Treasury has exclusive jurisdiction to hear and determine all questions of law and fact arising in connection with claims against the United States which are founded thereon. In reply it seems quite sufficient to suggest that many courts have taken jurisdiction of cases principally founded upon the Spanish War Revenue Act of June 13, 1898, *supra*, and this refunding act. No court before which such a proceeding was pending has thus far held that it lacked jurisdiction to hear and determine the questions involved therein. It has been repeatedly held that when the act granting the right did not also contain the remedy for its enforcement when refused the courts would intervene for that purpose.

> "Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector or the Secretary or both combined may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them" (Campbell *vs.* U. S., 107 U. S., 407).
>
> "There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section 308 is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section 1069 begins to run. There is thus no conflict with that section. Its full force is not impaired" (U. S. *vs.* Wardwell, 172 U. S., 48).
>
> "If there were any disputed questions of fact before the Secretary his decision in regard to those matters would probably be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing

to make the payment is not final, and the Court of Claims has jurisdiction of such a case.

"We have been referred to no case in this court which holds views contrary to those herein presented. We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute, and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute" (Medbury *vs.* U. S., 173 U. S., 492).

See also U. S. *vs.* Louisville, 169 U. S., 249; McKee Case, 164 U. S., 287; U. S. *vs.* Jordan, 113 U. S., 418; U. S. *vs.* Taylor, 104 U. S., 216; Edison Electric Illuminating Co. *vs.* U. S., 38 Ct. Cls., 208, 226; Foster *vs.* U. S., 32 Ct. Cls., 170; Durant *vs.* U. S., 28 Ct. Cls., 356, 367; Boughton *vs.* U. S., 12 Ct. Cls., 330.

As the act of June 27, 1902, did not contain any remedy for the enforcement of the rights it granted, according to the principles of these decisions the jurisdiction of the Secretary of the Treasury under that act was not exclusive and his decision thereunder was not final, but subject to review by the Court of Claims.

Merits.

This is the first case directly depending upon the interpretation and application of section 3 of the refunding act of June 27, 1902, to be presented for the consideration of this court, and there was apparently, prior to the decision in this case by the Court of Claims, but two decided cases (Thatcher *vs.* United States (149 Fed., 902), and Farrell *vs.* United States, 167 Fed., 639), and those relating to but minor points, in any courts, in which the questions involved arose primarily out of that statute. Nevertheless, the statute was

considered by this court in Vanderbilt *vs.* Eidman (196 U. S., 480), as throwing important and controlling light upon the meaning of sections 29 and 30 of the act of June 13, 1898, as amended.

Before proceeding to a more detailed discussion of the questions in issue we shall state five propositions which we believe are beyond dispute and that we conceive to have controlling force in this case. The first two of these propositions relate to the meaning of the refunding sentence of section 3 of the act of June 27, 1902, and may be regarded as having been definitely settled by the decision in Vanderbilt's case. They are:

FIRST. THAT THE VORD "VESTED," IN THE FIRST SENTENCE, MEANS THE SAME AS THE PHRASE "ABSOLUTELY VESTED IN POSSESSION OR ENJOYMENT," IN THE SECOND SENTENCE.

SECOND. THAT THE SUMS DIRECTED, BY THE ACT OF JUNE 27, 1902, TO BE REFUNDED INCLUDE SUMS WHICH, UNDER COLOR OF THE ACT OF JUNE 13, 1898, AND AMENDMENTS, HAD BEEN ILLEGALLY COLLECTED.

Neither of the foregoing propositions is now open or doubtful. Both are fully and broadly supported by the following extract from the opinion in Vanderbilt's case.

> "It is, we think, incontrovertible that the taxes which the third section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section, and cause its provisions to produce inexplicable conflict. From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the in-

> tendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated, and at the same time forbade like collections in the future." 196 U. S., 480, 500.

Other conclusions necessarily to be drawn from the decision in Vanderbilt's case will be presented hereafter. Attention has been directed to the foregoing propositions at the outset because they place beyond controversy preliminary but fundamental matters relating to the meaning of the refunding clause now relied upon and the significance of reference to the taxing statute as a guide in the interpretation of the refunding act.

THIRD. THE REFUNDING SENTENCE MUST BE LIBERALLY INTERPRETED.

Section 3 of the act of June 27, 1902, contains two sentences. The first of these directs certain refunds; the second is in essence an amendment to the taxing statute, as it forbids future collections under that law in certain cases. Both sentences refer, as decided in Vanderbilt's case (*supra*, pp. 16, 17), to the same interests, refunds of illegal collections already made being directed and future collections of the same character being prohibited. To say that that portion of the act which amends the taxing statute must be strictly construed against the taxing power is, therefore, precisely equivalent to asserting that the refunding portion must be construed liberally in favor of the citizen who has been called upon to pay the tax. Hence the rule reasserted, and applied to the war revenue act of June 13, 1898, in Eidman *vs.* Martinez (184 U. S., 578) requires, in this case, a liberal interpretation of the refunding sentence.

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous

language, and that a liberal construction be given to words of *exception* confining the operation of duty (Warrington *vs.* Furbor, 8 East., 242, 247; Williams *vs.* Sanger, 10 East., 66, 69; Denn *ex dem.* Manifold *vs.* Diamond, 4 Barn. & C., 243, 245; Tomkins *vs* Ashby, 6 Barn. & C., 541; Doe *ex dem.* Scruton *vs.* Smith, 8 Bing., 146, 152; Wroughton *vs.* Turtle, 11 Mees. & W., 561, 567; Gurr *vs.* Scudds, 11 Exch., 190), though the rule regarding *exemptions* from general laws imposing taxes may be different. Cooley, Taxn., 146; *Re Enston,* 113 N. Y., 174, 177 *sub nom.* People *vs.* Sherwood, 3 L. R. A., 464; 21 N. E., 87.

"We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. Hartranft *vs.* Wiegmann, 121 U. S., 609, 30 L. Ed., 1012; 7 Sup. Ct. Rep., 1240; American Net & Twine Co. *vs.* Worthington, 141 U. S., 468; 35 L. Ed., 821; 12 Sup. Ct. Rep., 55; United States *vs.* Wigglesworth 2 Story, 369, Fed. Cas. No. 16,690; Power *vs.* Barney, 5 Blatchf., 202, Fed. Cas. No. 11,361." 184 U. S., 578, 583.

See also Treat *vs.* White, in which this court said:

"It is also true, as said by this court in States *vs.* Isham, 17 Wall., 496, 504, 21 L. Ed., 728, 730, 'If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in Gurr *vs.* Scudds, 11 Exch., 191, "A tax cannot be imposed without clear and express words for that purpose."' With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer" (181 U. S., 264, 267, 45 L. Ed., 853, 854).

FOURTH. WHEN THE REFUNDING ACT OF JUNE 27, 1902, WAS ADOPTED CONGRESS WAS IN GENEROUS MOOD, AND WAS JUSTIFIED IN ITS LIBERALITY BY THE THEN EXISTING CONDITION OF THE FEDERAL TREASURY.

It is competent, of course, in seeking light upon the intention of Congress in adopting any statute, to refer to the condition of the times in which it was passed as throwing light upon its probable purpose. The condition in June, 1902, when the refunding act was passed, was that the Federal Government was draining into its treasury the circulating medium of the country, and was finding it extremely difficult, if not impossible, to restore it to circulation fast enough to prevent interference with the normal progress of trade and commerce. This condition was largely the result of the fact that the Spanish War revenue act of June 13, 1898, the repeal of which had not yet taken effect, had been immensely productive of revenue, while the succession of bountiful harvests and general business activity which followed the Spanish War had caused imports to flow into the country so rapidly as to raise the customs receipts to an unprecedented total. The following table, compiled from the Statistical Abstract of the United States for 1910 (p. 677), shows the customs and internal receipts for each year which ended with June 30, from 1894 to 1903, inclusive:

Year ended June 30—	Customs receipts.	Internal revenue receipts.	Total.
1894	$131,818,531	$147,111,233	$278,929,764
1895	152,158,617	143,421,672	295,580,289
1896	160,021,752	146,762,865	306,784,617
1897	176,554,127	146,688,574	323,242,701
1898	149,575,062	170,900,641	320,475,703
1899	206,128,482	273,437,162	479,565,644
1900	233,164,871	295,327,927	528,492,798
1901	238,585,456	307,180,664	545,766,120
1902	254,444,708	271,880,122	526,324,830
1903	284,479,582	230,810,124	515,289,706

The same authority gives the excess of ordinary receipts over expenditures or the excess of the latter over the former (p. 677) for the same years as follows:

Year ended June 30—	Excess of expenditures over receipts.	Excess of receipts over expenditures.
1894	$69,803,261	
1895	42,805,223	
1896	25,203,246	
1897	18,052,454	
1898	38,047,248	
1899	89,111,560	
1900		$79,527,060
1901		77,717,984
1902		91,287,376
1903		54,307,652
Total	$283,022,992	$302,840,072
Net excess of receipts over expenditures for ten years		$19,817,080

So in less than ten years, to 1902, the American people had seen the amount annually raised by taxation for the support of the General Government substantially doubled, and for three years they had seen the amount collected in taxes exceed the amount paid out for expenses by an amount so great that it was then certain that in a few months the excess would exceed the sum of the deficits of the six lean years that closed with the end of the fiscal year 1899. They had cheerfully borne the extraordinary burden of expenditures incident to the Spanish War, and accepted the additional and permanent expenses in which it resulted, but they were restive under the continuance of war taxes in time of peace, when their principal effect was to pile up in the treasury an useless, unwieldy, and even inconvenient, surplus. The public demanded a decrease of taxation, and the Administration and both parties in Congress assented; the only question was the form which the reduction should take. It is, perhaps,

not overstating the case to assert that the dominant majority in Congress was not inclined toward reductions in the rates of duties upon imports; therefore it was necessary that the whole reduction should come out of the internal revenue, a perfectly natural result, as it was through the internal-revenue taxes that the war revenue had chiefly been raised. The report of the Committee on Ways and Means of the House of Representatives in favor of the repeal of the special internal-revenue taxes imposed to provide for the war expenditures presents the following testimony concerning the fiscal condition of the Government:

> "It is a wonderful condition of our national finances which enables Congress to propose a reduction of $73,000,000 in the annual revenues. History furnishes no parallel to the situation. We had on the first day of the present month in the treasury an available cash balance of $177,632,088.26, and this notwithstanding the fact the treasury has paid out of this available surplus during the present fiscal year in the purchase of bonds for the sinking fund the sum of $61,196,444.56.
>
> "The Secretary of the Treasury in his annual report estimated the surplus of revenue over expenditures for the present fiscal year at $100,000,000. Subsequent events have confirmed this estimate as conservative and reasonable. With this surplus for the year it would seem that, notwithstanding this reduction of $73,000,000, we will still have a surplus of $27,000,000 for the next fiscal year.
>
> * * * * * * *
>
> "A surplus is a more healthy condition of affairs than a deficit, and no harm results from it so long as there are outstanding bonds to be paid. There is no valid reason why we should continue to accumulate it, however. None of our outstanding bonds are now due. We can only purchase them in the open market. Our credit is so astonishingly good and our bonds in consequence bring so large a premium that it is difficult to purchase them in the market. Sound business judgment dictates a sweeping reduction of

> our revenues." House Report No. 320, of February 3, 1902, entitled "Repeal of War Revenue Taxation," Fifty-seventh Congress, First Session, p. 3, which recommended its enactment.

The repeal recommended in the report from which the foregoing has been taken was accomplished by the act of April 12, 1902, which was made to take effect on July 1, 1902 (32 Stat., 97).

But this repeal only purported, as stated in the extract above, to reduce taxation in the sum of about $73,000.000, and, as shown in the last foregoing table, the surplus revenue of the twelve months from July 1, 1901, to June 30, 1902, amounted to $91,287,376, while the then latest report of the Secretary of the Treasury (see above extract from Ways and Means Committee report) had estimated that surplus at $100,000,000. Under these conditions it is not strange that Congress regarded it as its duty to go farther than it had gone by the repealing act and to deal both generously and justly with those who had paid taxes of doubtful validity into the Federal Treasury. This was the genesis of the refunding act of June 27, 1902, under which this suit is brought. That the controlling purpose of Congress was as has been stated is further proven by the first section of the act of June 27, 1902, which provided for the refundment of all legacy taxes collected on account of bequests for uses of an educational, charitable, and religious character. Scarcely more than a year before Congress had dealt with this subject in a less generous mood, and had amended the act of June 13, 1898, by the act of March 2, 1901, so as to exempt bequests for such purposes *after March 1, 1901.* But at that time it had not seen fit to make the exemption retroactive, but had, on the contrary, preferred to retain in the Treasury taxes on such bequests in cases in which they had already been paid. More generously, by the act of June 27, 1902, it made the exemption complete and retroactive by directing that all such payments be refunded. In the same mood,

both just and generous, Congress added the third section, directing such refunds as that sought in the case now at bar, and in the light of that pervading spirit of equity and liberality is it necessary to seek for the purpose and meaning of that section.

FIFTH. THE REFUNDING SENTENCE MUST BE INTERPRETED SO AS TO AVOID INJUSTICE.

The general proposition that a construction of a statute which would produce injustice will be avoided if possible, applies even where the rule of strict interpretation, which controls the application of special taxing laws, is not involved. It has been specifically applied to the act of June 13, 1898, and, therefore, has unquestionable authority in this case. In Knowlton *vs.* Moore (178 U. S., 41), referring to and illustrating inequalities that would result from an interpretation which it was asked to adopt, this court said:

> "Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on.
>
> * * * * * * *
>
> "We are therefore bound to give heed to the rule that, where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. Bate Refrigerating Co. *vs.* Sulzberger, 157 U. S., 37, 39 L. ed., 611; 15 Sup. Ct. Rep., 508; Wilson *vs.* Rousseau, 4 How., 646, 680; 11 L. ed., 1141, 1156; Bloomer *vs.* McQuewan, 14 How., 539, 553; 14 L. ed., 532, 538; Blake *vs.* National Banks, 23 Wall., 307, 320; 23 L. ed., 119, 121; United States *vs.* Kirby, 7 Wall., 482, 486; 19 L. ed., 278, 280." 178 U. S., 41, 76-77.

SIXTH. THE REFUNDING SENTENCE MUST BE INTERPRETED SO AS TO GIVE EFFECT TO EVERY WORD WHICH IT CONTAINS.

This is merely an assertion of a rule that is always enforced and neither argument nor numerous citations are necessary.

> "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times." Market Co. *vs.* Hoffman, 101 U. S., 112, 155.

Further discussion of the meaning of the refunding sentence may rest solidly therefore, upon (first) the conclusion that it directs the refunding of all sums collected under color of the act of June 13, 1898, upon or in respect of "contingent beneficial interests" that had "not become absolutely vested in possession or enjoyment prior to said July 1, 1902," (second) the principle that the sums to be refunded include sums that were illegally collected, (third) that the refunding sentence must be liberally interpreted in favor of citizens, (fourth) that it must, if possible, be so interpreted as to avoid inequality or injustice in its application, and (fifth) that effect must be given to every word that it contains.

A seventh proposition springs naturally from those which have gone before. It is:

SEVENTH. THE TERM "CONTINGENT BENEFICIAL INTERESTS," IN THE REFUNDING SENTENCE, BEING QUALIFIED BY THE PHRASE "ABSOLUTELY VESTED IN POSSESSION OR ENJOYMENT," IN WHICH PHRASE THE WORD "VESTED" IS MODIFIED BY THE ADVERB "ABSOLUTELY" AND BY THE ADVERBIAL PHRASE "IN POSSESSION OR ENJOYMENT," NONE OF THESE

TERMS CAN BE INTERPRETED AS HAVING REFERENCE TO MERELY TECHNICAL RIGHTS OR ESTATES OR AS HAVING BEEN USED IN A TECHNICAL SENSE.

The conclusion embraced in the foregoing is, indeed, made necessary by the use of the qualifying word "absolutely" for, while the word "vested" undoubtedly has a technical meaning with reference to real property that may have been, with somewhat waning definiteness, extended to interests in personalty, the word "absolute" and the term "absolutely vested" possess significance that excludes all technical limitations. That is not "absolute" which is uncertain, qualified, limited, conditioned, defeasible, a matter of estimate or of necessarily more or less arbitrary assumption, subject to determination or interruption upon the happening of an uncertain event. That gift is not "absolutely vested" which may be taken away by its terms by the death of the donee.

As said Chief Justice Marshall in Johnson's and Graham's Lessee *vs.* McIntosh (8 Wheat., 543; 5 L. ed., 681):

> "An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it." 8 Wheat., 543, 588; 5 L. ed., 681, 692.

Yet it is now claimed in this case by the Government that on March 16, 1899—that is to say, at the death of her testator, or at least at some date prior to July 1, 1902—there became "absolutely vested" in Mary Wadleigh Stokes a right to receive the income of the trust fund provided by his will on every quarter-day for over thirty years thereafter; to be specific, let us say, for example, on March 16, 1929, although her death, should it occur at any time prior to that date, would make immediately complete the wholly incompatible right of the Home for Aged Couples of the City of Philadelphia to receive the corpus of that fund free from all obligation to her or to her estate.

The canons of statutory construction do not favor finding superfluous words in any statute; there are no words which may ordinarily be ignored, but the word "absolutely" is one of especial strength and significance.

> "A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. * * * It is, we think, impossible to compare the sentence which prohibits a State from laying 'imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the General Government, without feeling a conviction that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.'" McCulloch *vs.* Maryland, 4 Wheat., 316, 414-415; 4 L. ed., 579, 603.

So there is no room for doubt that when Congress, in the amendatory and refunding act, specifically excluded from taxation all interests not "absolutely vested," its purpose was far broader than would have been adequately expressed had it used the single word "vested."

But Congress, in dealing with the subject of legacy taxation, during the years from 1898 to 1902, was not using words in their narrow technical meanings or seeking to impose these taxes upon merely technical interests, rights, or estates. We quote from the opinion in Vanderbilt's case:

> "It will be observed that the duties imposed in section 29 have relation to two classes; first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or

otherwise. As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting, in a technical sense, of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules. A consideration of the subsequent provisions of the section leaves no room for such a contention, * * *." 196 U. S., 480, 491-494.

"Moreover, the meaning of the statute, fairly to be deduced from the reiteration in each of the five paragraphs of the beneficial interest and clear value as the subject of the tax, is greatly strengthened by the inference to be drawn from the fact that nowhere in the section is there contained language referring to technical estates in personalty, or treating them as subjects of taxation, despite the absence of the right to immediate possession or enjoyment." 196 U. S., 480, 494.

"In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached." 196 U. S., 480, 495.

"Concluding, as we do, that there was no authority under the act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned on his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government." 196 U. S., 480, 501.

Opposed to the term "absolutely vested" in the refunding act appears the antithetical term "contingent." The Standard Dictionary gives "unconditional" as one of the synonyms of "absolute," and among its antonyms includes the words "conditional," "contingent," "imperfect," "incomplete," "limited," and "conditioned." That which is "absolutely vested" must have irrevocably lost the characteristic of contingency. Hence the true meaning of the clause is that no contingent beneficial interest shall be taxed while it remains in any degree contingent—that is to say, until every contingency essential to its realization has happened. If the contingency as to a particular payment is that a particular person shall be alive to receive it on the date set for payment, it follows that there can be no taxable interest in that payment until the day arrives and the contingency is satisfied. The word "contingent," being used, like the others, in a non-technical sense, it is appropriate to seek the definitions which are applicable in its ordinary use. In the Century Dictionary it has the following definitions:

> "1. Not existing or occurring through necessity; due to chance or to a free agent; accidentally existing or true; hence, without a known or apparent cause or reason, or caused by something which would not in every case act; dependent upon the will of a human being, or other finite or free agent.
>
> "2. Dependent upon a foreseen possibility; provisionally liable to exist, happen, or take effect in the future; conditional; as a contingent remainder after the payment of debts; a journey contingent upon the receipt of advices; a contingent promise."

Webster's New International Dictionary contains the following definitions:

> "1. Liable, but not certain, to occur; possible.
>
> "2. Happening from unforeseen causes, or subject to unforeseen conditions; accidental or incidental chance."

And the following is from the Standard:

> "1. Liable to occur, but not determinable by any known rule or law; resulting from an agency or agencies the operation of which is uncertain; not predictable; fortuitous."

And Webster's New International, after defining the word "contingency" as meaning—

> "That which is contingent, a chance event; often, an event or condition looked forward to as possible or probable, or one dependent upon an uncertain happening,"

illustrates its definition by quoting, from Hallam, the following:

> "The remarkable position of the queen rendering her DEATH a most important CONTINGENCY."

EIGHTH. THE REFUNDING SENTENCE MUST BE INTERPRETED, IF POSSIBLE, SO AS TO FIND A MEANING FOR THE PHRASE "CONTINGENT BENEFICIAL INTEREST * * * NOT ABSOLUTELY VESTED IN POSSESSION OR ENJOYMENT" WHICH IS BROAD ENOUGH TO BE APPLICABLE TO A "DISTRIBUTIVE SHARE."

Omitting only the two words "legacy or," which certainly are not words of restriction or limitation, before the words "distributive share," the refunding clause of section 3 of the act of June 27, 1902, would read as follows:

> "That in all cases where an executor, ADMINISTRATOR, or trustee shall have paid, or shall hereafter pay, any tax upon any DISTRIBUTIVE SHARE of personal property under the provisions of the act approved June 13, 1898, entitled, 'An act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper ap-

> plication being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on CONTINGENT BENEFICIAL INTERESTS WHICH SHALL NOT HAVE BECOME VESTED prior to July 1, 1902."

It has already been noted on the authority of Vanderbilt *vs.* Eidman, *supra,* that the word "vested" in the foregoing means "absolutely vested in possession or enjoyment" (*supra,* pp. 16, 17). The words "distributive share" cannot be regarded as redundant, as surplusage, or as without meaning. The elementary rule requiring that effect be given to each word in a statute demands that they shall be treated as significant and, therefore, that the qualifying words which define the instances in which sums paid in respect to "distributive shares" shall be refunded shall receive a sufficiently broad interpretation to render them applicable to such shares. "Distributive shares" are, of course, shares in personalty of intestates whose estates are distributed in accordance with the intestate laws of their domicils. A definition of the phrase "absolutely vested in possession or enjoyment" that would exclude from the operation of the refunding statute *every* "distributive share" in the personalty of an intestate dying between June 13, 1898, and June 27, or July 1, 1902, is not permissible. It is not for us to suggest in what cases "distributive shares" may fail to become "absolutely vested" and may remain "contingent" within the intendment of the statute, nor does this case render it incumbent upon this court to do so. It is enough to observe that the definitions of the words "contingent" and "absolutely vested" required to give effect to the words "distributive share" cannot be so narrow as to exclude from the benefit of the refunding clause one so situated as the appellee in the case at bar.

NINTH. EVEN IF THE RIGHT OF MARY WADLEIGH STOKES TO RECEIVE IN SUCCESSIVE QUARTERLY PAYMENTS TO THE END OF HER LIFE THE INCOME, IF ANY, EARNED AFTER JULY

1, 1902, BY THE TRUST FUND CREATED FOR HER BENEFIT BY THE WILL OF HER TESTATOR, WAS TECHNICALLY A "VESTED" RIGHT AT ANY TIME PRIOR TO JULY 1, 1902, IT REMAINED, AS TO EACH AND EVERY ONE OF SUCH PAYMENTS, "CONTINGENT" AND NOT "ABSOLUTELY VESTED" FOR THE REASON THAT IT WOULD BE DEFEATED BY HER DEATH.

The distinction between those bequests which are vested and those that are not vested is at best a narrow and technical distinction. Fortunately, there is nothing in this case which suggests reliance, by either of the parties, upon any of the rules by which it is governed.

> "A bequest to A. at twenty-one, and a bequest to A. payable at twenty-one, do not much differ in expression, yet one is a vested and the other a contingent gift." Hawkins on Wills (2d ed.), 226.

In Vanderbilt *vs.* Eidman, *supra,* it was held by this court that separate gifts, each of one-half of the residuary estate of his testator, to Alfred G. Vanderbilt, one to be paid over when he became thirty years of age and the other five years thereafter, each conditioned upon his survival to the date set for payment, neither condition being satisfied prior to July 1, 1902, were on that date "contingent" and not "absolutely vested." Moreover, in that case it was held to be unnecessary to determine whether these were vested legacies, in a technical sense. Surely, the judgment in that case did not depend either upon the fact that there were two rather than ten, twenty or sixty, or any other number of payments provided for in the will, or upon the fact that the interval between payments was five years rather than one year or three months or some other period of time. Nor did that judgment depend upon the fact that the payments just referred to were to be made out of the principal of the trust fund for, as will be adverted to more in detail hereafter, the same judgment provided for a refund of the sum collected with respect to the income which he was to receive between his thirtieth and

thirty-fifth birthdays from the balance of the trust fund that would then remain in the possession of his trustees. This income was to be paid to him, according to the terms of the will, "as received" (196 U. S., 480, 481) by the trustees, a fact which finally negatives the idea that the number or frequency of the payments could have in any degree influenced the conclusion.

Under the will of her testator, Mary Wadleigh Stokes received no bequests payable out of the principal of the trust fund. Her trustees were directed to collect the income therefrom and, after deducting an annuity of $500.00, to

> "pay the same over, less all proper charges thereon, to the said Mary Wadleigh Stokes, in quarterly payments, during all the period of her natural life,"

and at her demise the trust was to determine (unless her mother survived her, in which case it was to continue for the purpose of paying to her an annuity of $1,000.00 and to determine on her death with the same effect as though she had died before her daughter) and the entire principal of the fund was to be paid to the charities indicated in the will.

It is immaterial, in this case, whether this bequest gave to the legatee a technically vested right to receive the income. Yet it is certain that there is no substantial difference between the effect of these words in the will and that which would have resulted had the testator specified the date of each payment and specifically limited each by the condition that the beneficiary named should then be alive. The testator might have said:

> "If Mary Wadleigh Stokes shall survive to a date three months after the fund shall come into the possession of my said trustees, to pay her the income received to that date,"

and he might have continued, repeating the condition and specifically applying it to each quarter day thereafter through a period extending to the utmost possible limit of

her natural life. Had he done so, the situation on July 1, 1902, as to each quarter day subsequent to that date, would have been exactly the same as was the situation on that date with reference to the payments that in Vanderbilt's case, *supra*, were to be made when, after that date, Alfred G. Vanderbilt became thirty and thirty-five years of age. And *a fortiori* the situation would have been the same as it was in Vanderbilt's case with reference to the income to be paid to him "as received" during the five-year interval between those payments of principal. But the form which has just been suggested would have been as cumbrous as it was needless; the language used was aptly conceived to convey precisely the same benefits and the substantial effect as to the taxability must be the same. To adopt any other view would be to look only at mere form and to disregard substance and reality; something this court never does.

TENTH. THE DECISION IN VANDERBILT VS. EIDMAN, 196 U. S., 480, IF PROPERLY UNDERSTOOD, ESTABLISHES THE PRINCIPLE THAT RIGHTS SUCH AS THOSE OF MARY WADLEIGH STOKES IN SO FAR AS THEY WERE NOT TO BE REALIZED UNTIL AFTER JULY 1, 1902, WERE NOT TAXABLE UNDER THE ACT OF JUNE 13, 1898, AND AMENDMENTS. AS THE UNCERTAINTIES AS TO THEIR REALIZATION, EXISTING ON JULY 1, 1902, MADE THEM UNTAXABLE, IT FOLLOWS THAT THE AMOUNTS ILLEGALLY COLLECTED ON ACCOUNT OF SUCH RIGHTS ARE WITHIN THE SCOPE OF THE REFUNDING CLAUSE OF THE ACT OF JUNE 27, 1902.

That portion of Cornelius Vanderbilt's will under which Alfred G. Vanderbilt received the interest held not to be taxable required the trustees

> "to pay the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one-half the portion of said estate to be set apart for that purpose by my executors and survivors of them. And upon

> further trust thereafter to pay to my said son, Alfred G., the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof." 196 U. S., 480, 481.

The sentences next following the foregoing expressly limited Alfred G. Vanderbilt's interests in the trust estate to the period of his life, passing the beneficial interests to his issue if he died leaving issue, and, if otherwise, providing that they should pass to a brother, or if the latter died, to sisters or the survivor of them. If all four of the named beneficiaries had died before the termination of the trust the decedent would have been intestate as to his residuary estate.

There are distinguishable, in this portion of the will, four distinct classes of benefits accruing to Alfred G. Vanderbilt, on the settlement of his father's estate and the ascertainment that there was something left for the residuary legatee, as follows:

> A. Rights to receive the income from one-half of the residuary estate, contingent upon his survival to the respective dates of payment, FROM HIS FATHER'S DEATH until he became THIRTY years of age.
>
> B. Additional rights to receive the income from one-half of the residuary estate, contingent upon his survival to the respective dates of payment, FROM HIS FATHER'S DEATH until he became THIRTY-FIVE years of age.
>
> C. The right to receive one-half of the residuary estate, contingent upon his survival to the date set for payment, on the last day of his THIRTIETH year.
>
> D. The right to receive one-half of the residuary estate, contingent upon his survival to the date set for payment, on the last day of his THIRTY-FIFTH year.

The residuary estate was appraised at $18,972,117.46 (196 U. S., 480, 482). The right to receive income was assessed on the arbitrary assumptions, assumptions arbitrarily applied in the assessment of all similar interests (Treasury Decisions, No. 20443, being "Series 7, No. 3, Revised, Supplement No. 1," issued under date of December 16, 1898, over the signature of the Commissioner of Internal Revenue) that the residuary legatee would live to be thirty-five years of age and that the residuary estate would produce exactly four per cent annually, in this case amounting to $758,884.70. That is to say, no allowance was made for the contingency of Alfred G. Vanderbilt's death before the end of the period, although on the happening of that event all his rights would at once have ceased, and the "present worth" on which the tax was collected was assumed to be equivalent to the sum of money which, if invested at four per cent per annum, would produce $758,884.70 at the end of each year throughout the entire period. Accepting, for argumentative purposes, the accuracy of the four per cent rate of annual income, it is possible to state the worth of the respective classes of benefits in the terms to which they were reduced, for taxation purposes, by the collector. They were:

A. Rights to receive $379,442.35 each year, contingent on survival, FROM HIS FATHER'S DEATH until he became THIRTY years of age.

B. Additional rights to receive $379,442.35 each year, contingent on survival, FROM HIS FATHER'S DEATH until he became THIRTY-FIVE years of age.

C. The right to receive $9,486,058.73, contingent on survival, on the last day of his thirtieth year.

D. The right to receive $9,486,058.73, contingent on survival, on the last day of his THIRTY-FIFTH year.

The first tax payment exacted from the estate, under the act of June 13, 1898, was in the sum of $115,191.28, which was claimed to be properly due upon the rights to income. With curious inaccuracy of vision, the collector confused, for the purposes of assessment, rights A and B and lost sight

of the fact that right B, should the beneficiary survive so long, would continue five years after the termination of right A. He found that Alfred G. Vanderbilt was approximately twenty-two years of age at the time of his father's death, and, consolidating rights A and B, calculated that he would receive for eight years—that is—until he was thirty, the equivalent of an annuity of $758,884.70. Therefore the collector multiplied $758,884.70 by the present worth, according to tables supplied by the Commissioner of Internal Revenue, at Washington, of the right to receive one dollar at the end of each year for eight years and obtained $5,119,612.43 as the total value of that right. The tax rate, 2¼ per cent, applied to this sum gives $115,191.28, the amount at first collected. On the theory then held by the Government, however, the tax ought to have been assessed and collected as follows:

	Amount of annuity.	Duration of rights in years.	Value according to Government tables, of rights to receive $1.00 at end of each year during period.	Value of rights according to Government's theory.	Tax at 2¼ per cent.
Rights A	$379,442.35	8	$6.73273	$2,554,686 69	.....
Rights B	379,442.35	13	9.98565	3,788,978.50	.....
Total..	.....	.....	.....	$6,343,665.19	$142,732 47

So that on the Government's own theory, as originally held and as now sought to be revived, it ought to have collected $142,732.47 instead of $115,191.28, or $27,541.19 more than it did collect.

After the first collection, however, the Government adopted a new theory, under which it claimed the right to tax everything which Alfred G. Vanderbilt *might* receive

under the residuary clause, and on this theory demanded and received an additional payment of $311,681.36, making up (after credit for the first payment of $115,191.28) the full tax then claimed of $426,872,64, or two and one quarter per cent of $18,972,117.46. This further payment of $311,-681.36 was made under protest on September 3, 1901, and suit was promptly brought for its recovery. In this suit no question whatever was raised as to the Government's right to the sum of $115,191.28 originally collected. As the result of this suit the whole $311,681.36 has been repaid with interest from date of payment added. The refund sanctioned by the judgment of this court in Vanderbilt *vs.* Eidman therefore consisted of ALL THE TAX SUED FOR, and this included all the tax on rights C and D and SO MUCH OF THE TAX ON RIGHTS B as related to the last five years of the continuance of those rights. Plainly there can be no doubt that, as held in Disston *vs.* McClain (147 Fed., 114), Union Trust Company *vs.* Lynch (148 Fed., 49; 164 Fed., 161), and Fidelity Trust Company *vs.* United States (45 Ct. Cl., 362), the entire tax in relation to income rights that would have closed with the death of the beneficiary, and so far as the contingency of his survival was not satisfied before the repeal of the tax on July 1, 1902, would have been recovered in that suit, had the original payment been made under protest and had the pleadings presented that issue. The action of this court, as to so much of the tax in respect to rights B as was covered by the suit, should now preclude the contention that income rights extending beyond the repeal and subject to being defeated by a contingency thereafter happening were taxable prior to the repeal at their then full "present worth" as though every contingency had been satisfied.

The certified questions and the whole record of the case show that no question as to liability for the tax payment originally made was raised on behalf of Alfred G. Vanderbilt, and that no question relating thereto was before the

Supreme Court or could have been determined in that case. The taxation of his rights to receive the income from the one-half of the trust estate remaining in the possession of the trustees after the end of his thirtieth year was, however, before the court and was held to have been improper by the court That this is the case is plain when it is borne in mind that the third certified question, the only one which was answered, and answered in the negative, inquired whether the act of 1898, as amended, authorized a tax with respect to "any" of the rights of the residuary legatee:

> "with the exception of his present right to receive the income of such estate until he attains the age of THIRTY years."

So it was decided by the Supreme Court that the only rights to receive income which were before it on the question as to the legality of the tax sought to be recovered, were not taxable. It will be impossible now to hold that rights to receive income from personal property, rights continuing only if and while the beneficiary continues to live, during a period otherwise certain or uncertain, even though they may be called "present rights," were lawfully taxable, as an entirety, while the duration of that life was still uncertain, without reversing so much of Vanderbilt *vs.* Eidman, involved in the general negative answer to the third question, as denied the right of the Government to the tax on the rights to receive income from one-half of the residuary estate from the close of Alfred G. Vanderbilt's thirtieth to the end of his thirty-fifth year.

That denial was right and it was not inadvertent. Leaving out of consideratiton, for the moment, the right to receive the principal of the estate in two equal payments separated by an interval of five years, the balance of the clause disposing of the residuary estate is precisely equivalent to what it would have been had it read, as it would have read with the omission of the words disposing of the principal, as follows:

> "To pay the net income of said estate to him as received until he arrives at the age of thirty years and thereafter to pay to my said son, Alfred G., the income from the balance remaining (that is to say, from the one-half of the principal not then otherwise disposed of) of said estate until he shall arrive at the age of thirty-five years."

Alfred G. Vanderbilt did not ask to have refunded to him the tax collected on his rights to receive the income devised under the first half of the foregoing, perhaps because, if any rights to income not paid prior to July 1, 1902, were taxable, his income rights had (accepting the Government's method of valuation) been undervalued at least twenty per cent, and because nearly one-half of the period between his father's death, on September 12, 1899, and his thirtieth birthday, as disclosed by the statement of the case by Mr. Justice White (196 U. S., 480, 481), had passed before the repeal of the Act of June 13, 1898, creating the liability to the tax. But he did ask for the repayment of so much of the tax as was collected on his rights to receive the income devised under the second half. AND SO FAR AS HE ASKED HE RECEIVED.

Unquestionably income payments received prior to the repeal, on July 1, 1902, of the taxing statute were, if otherwise within its terms, taxable. But if Alfred G. Vanderbilt had, when he paid the tax, a present right to receive all the income from all the residuary estate until he should become thirty years of age he had, also and equally, at that time, a present right to receive all the income from one-half of the residuary estate FROM HIS FATHER'S DEATH TO THE END OF HIS THIRTY-FIFTH YEAR. By the same inexorable process of reasoning it is apparent that if there was a taxable right in the one case there was, also, a taxable right in the other. If the right to receive the income during the year 1904, for example, from the whole $18,972,117.46, the appraised value of the residuary estate, a right absolutely contingent and depend-

ent, be it noted, on the beneficiary being alive in 1904, was a taxable right in the year 1900 or 1901, or at any time before the taxing law was repealed or before the contingency which could be satisfied in 1904 only, was satisfied, the right to receive the income from $9,486,058.73, one-half of the residuary estate, in 1909, granted by the same clause of the same will and, by identical words in the will, made equally dependent upon the qualitatively identical contingency that he should be alive to receive the payments, was an equally taxable right on the third day of September in 1901, when he paid $311,681.36, the amount of the tax, assessed in part on this right. Yet all this $311,681.36 he afterwards sued for and recovered, together with interest from the date of payment.

Suppose that there had passed to trustees, in this country, on June 30, 1900, under the valid will of a testator, a citizen of the United States, who died two years before, personalty worth $1,000,000.00 and invested so as to produce precisely four per cent per annum and these trustees were controlled by a clause in the will directing them to make payments to the testator's son, that clause reading as follows:

> "On each thirtieth day of June beginning with the year 1901 and to and including the year 1904 to pay to my said son a sum equal to four per cent of said original trust fund, on June 30, 1905, to pay to my said son a sum equal to fifty-four per cent of said original trust fund, on each thirtieth day of June beginning with the year 1906 and ending with the year 1909 to pay to my said son a sum equal to two per cent of said original trust fund and on June 30, 1910, to pay to my said son a sum equal to fifty-two per cent of said original trust fund, but in case my said son shall die before any of the dates of payment herein fixed, then and in that case, my said trustees shall, upon the next of said dates then ensuing, pay over all of said original trust fund and all accumulated income thereon to —— Orphan Asylum."

Such a provision in a will would be clear and definite. Under it the son of the testator, if he should be alive on the

dates fixed, would receive payments as indicated below and after the last payment the fund, assuming the accuracy of the four per cent rate of income applied to all such cases by the Government, would be exhausted.

Payments Under Hypothetical Will.

	Out of income.	Out of principal.	Total.
June 30, 1901..	$40,000.00	Nothing.	$40,000.00
June 30, 1902.....	40,000.00	Nothing.	40,000.00
June 30, 1903.....	40,000.00	Nothing.	40,000.00
June 30, 1904.....	40,000.00	Nothing.	40,000.00
June 30, 1905.....	40,000.00	$500,000.00	540,000.00
June 30, 1906.....	20,000.00	Nothing.	20,000.00
June 30, 1907.....	20,000 00	Nothing.	20,000.00
June 30, 1908.....	20,000.00	Nothing.	20,000.00
June 30, 1909	20,000.00	Nothing.	20,000.00
June 30, 1910.....	20,000.00	500,000.00	520,000.00

Now, except for the diminished amounts, the foregoing looks very much like Vanderbilt's case. It is Vanderbilt's case in substance, it is his case in everything but the terminology employed and the mere form of the devise, which mere form is, of course, of no importance. If it had been Vanderbilt's case and Vanderbilt had sued exactly as he did sue, he would have recovered all the taxes collected in respect of the payments made in 1906, 1907, 1908, 1909 and 1910. He would also have recovered the tax collected with respect to $500,000.00 of the payment of $540,000.00 made to him in 1905, but the tax would have been retained as to the $40,000.00 paid at the same time and all the taxes collected with respect to payments made to him in 1901, 1902, 1903, and 1904 would have been retained. But this absurd result was Vanderbilt's own fault and not because of any defect in the law itself. He made no attempt to recover taxes collected in respect of the payments of 1903 and 1904 or with respect to two twenty-sevenths ($40,000.00 out of $540,000.00) of the payment made in 1905.

The Government now contends for another and an equally great absurdity. Its claim is that, considering for example, the payment of $520,000.00 to the beneficiary on June 30, 1910, it should have retained the tax with respect to the $20,000.00, as to which this court authorized the refund, but ought not to have retained that collected with respect to $500,000.00 of the $520,000.00 then paid and also, by this court, directed to be refunded. Appellee's contention is that the rule which was applied to the whole payment of $520,000.00 on June 30, 1910, and to the payments of 1906, 1907, 1908 and 1909 and to so much of the payment of $540,000.00 in 1905 as was presented to this court would, also, had the case permitted, have been applied to the payments made in 1903 and 1904, that is to say to all payments subsequent to the repeal of the tax on July 1, 1902. It is the only consistent conclusion from what this court has already commanded and that which is inconsistent is impossible.

The elder Vanderbilt's estate was appraised at $18,972,117.46. Throughout the whole administration of the act of June 13, 1898, the Commissioner of Internal Revenue uniformly assessed the tax on the arbitrary assumption that all personalty produces income at the rate of precisely four per cent per annum, an assumption which, it will be parenthetically noted, controlled arbitrarily the amount of the tax and that, hence, it could not be within the power of any administrative officer to make. But, accepting the accuracy of this rate of income, for the purpose of concreteness only, it appears that during his thirtieth year Alfred G. Vanderbilt received $10,244,943.43 (being $9,496,058.73, or the one-half of the residuary estate to which he became entitled on the last day of his thirtieth year, plus $758,884.70, the income on the whole residuary estate which he was entitled to have paid to him as it was received during that year). All these dollars were exactly alike to the recipient; he received none of them until after the repeal of the taxing statute; he had no right to receive any of them that was not

dependent upon a contingency which could not be satisfied until after the repeal; the contingency absolutely controlling his right to each one of these dollars was the same, viz., that he should be alive at the date set for payment. The Government originally claimed the right to tax all these dollars, that is to say, the whole $10,244,943.43, which it says he received during his thirtieth year, and that claim was logical and consistent in itself, albeit not sanctioned by the statute under which it was advanced. Now, however, but partially instructed by the decision of this court in Vanderbilt's case, although by that decision Vanderbilt obtained all for which he saw fit to contend, the Government most illogically and inconsistently urges that it was entitled to the tax in respect to the income (estimated) of $758,884.70, but was not entitled to the tax with respect to the $9,486,058.73 of principal. THE SLENDER AND TECHNICAL BASIS OF THIS CLAIM OF THE GOVERNMENT IS FOUND WHOLLY IN THE FACT THAT THE SMALLER SUM WAS INCOME AND THE LARGER SUM PRINCIPAL. In other words the contention is actually advanced, and is the sole basis of the Government's case, that a right to a payment of (say) $25,000.00 OF INCOME on a date after the repeal was taxable before the repeal, and a right to a payment of (say) $25,000.00 out OF PRINCIPAL on the same date was not taxable, although both rights grew out of the same clause of the same will, both were liable to be defeated by the happening of the same event, both were in every non-technical sense dependent upon the same contingency. This too subtle and scholastic distinction has no place in a forum where form is always brushed aside and substance is always considered; it has no place in connection with a taxing law where ambiguities and doubts are resolved in favor of the citizen; it has no place anywhere where the clear light of intelligence makes futile the devices of false and misleading sophistry.

This tax cannot be made to rest upon any merely technical definition or distinction (*supra*, pp. 24-29). In the somewhat strained effort to apply technical terms that originated in and

received their meaning from the law of real property to similar, but by no means identical, interests in personal property, it may be that a technically different name must be applied to Vanderbilt's right to receive one-half of the principal held for him, at the close of his thirtieth year and his right, on the same day, to have paid to him the income received on that day from the whole fund. But the substantial fact is that both rights were subject to the same contingency, that both would have been defeated had he died at any time prior to that date, that whether either would be paid to him was uncertain until long after the taxing law was repealed. His contingent right to the principal was held to be non-taxable because it was uncertain whether the contingency would be satisfied, his rights to income were held to be non-taxable, as far as covered by the suit for the same reason. A right to receive an income payment on a future date and a concurrent right to receive principal on the same future date, provided the person named as recipient shall then be alive, are substantially controlled by the same contingency; there is *neither qualitative nor quantitative difference.* If one right was taxable under the act of June 13, 1898, so was the other; if one was non-taxable, the other was non-taxable.

This inevitable conclusion was recognized by Assistant Attorney General Robb, who represented the Government before this court in Vanderbilt's case. His brief in that case contains the following, the initial reference being to his opponent's theory of the case:

> "His theory leads us naturally to conclude that the income should not be taxed until it was actually earned and ready to be paid over to him. *The income he will receive in his thirtieth year is no more vested in possession or enjoyment than is the principal that will be paid him when thirty or thirty-five. Both are subject to be divested if he dies before reaching that age*" (Brief, pp. 26-7).

ELEVENTH. FEDERAL COURTS HAVE REPEATEDLY HELD THAT RIGHTS SUCH AS THOSE TAKEN BY MARY WADLEIGH STOKES ARE WITHIN THE PRINCIPLE LAID DOWN BY THIS COURT IN VANDERBILT VS. EIDMAN, SUPRA.

In Disston *vs.* McClain (147 Fed., 114) the Circuit Court of Appeals for the Third Circuit had before it the question whether rights to receive income under the will of a testator who died while the act of June 13, 1898, was in force, from a trust fund provided by such will, but during a period of uncertain duration limited by the life of the legatee and extending beyond the date of the repeal, were taxable at the beginning of the period, as an entirety at the "present worth" of those rights during the expectancy of life of the beneficiary, as shown by mortuary tables. In that case the beneficiary, Rachael Asch, was left an annuity of $15,000.00 to be paid quarterly during her natural life. The appeal was heard before Circuit Judges Dallas and Gray and District Judge Bradford, and the court, resting its judgment upon the reasoning of the opinion in Vanderbilt *vs.* Eidman, *supra,* held that the tax was not lawfully exacted (147 Fed., 114, 117). The opinion, written by Judge Gray, refers to Vanderbilt's case at some length, calling attention to the fact that the tax claimed in respect to Vanderbilt's income rights from his father's death to the end of his thirtieth year was voluntarily paid and was not sued for, as follows:

> "But we repeat that the question as to the propriety of this voluntarily paid tax was not, and could not have been, before the court, nor do we think that, in stating the question to be whether the tax was to be confined to that which had been voluntarily paid and could not be a subject of suit, or was to include that also which was paid under protest, and for which alone suit was brought, the learned justice can be taken to have conceded the legality of the former." 147 Fed., 114, 120.

And, in the sentence immediately following the foregoing, again referring to the opinion in Vanderbilt's case, Judge Gray said:

> "On the contrary, the reasoning by which the illegality of the protested tax is demonstrated, tends largely to show the illegality of the tax voluntraily paid." 147 Fed., 114, 120.

And, again:

> "While we incline to think the reasoning of the court, in maintaining this proposition, tends to exclude from taxation, under the war revenue law, the interest of Alfred G. Vanderbilt in the residuary personal estate, the income of which he was to enjoy until he reached the age of thirty years, no question as to it was before the court." 147 Fed., 114, 122.

In Disston's case the Circuit Court of Appeals found a distinction between a gift of a life annuity and one of rights to receive during life all the income of a fund, but its judgment by no means rests upon this narrow basis. It found Rachael Asch's right to each separate payment to be separately conditioned upon a different contingency, that is to say, her survival to the date set for such payment.

> "The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but *each, contingent, before vesting, on the legatee's being alive when it became due,* the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman case, until and as it takes effect in possession or enjoyment." 147 Fed., 114, 117.

> "By confining ourselves to what the statute plainly says, and avoiding unauthorized and artificial constructions, we can find only as a subject of taxation thereunder, *a series of payments* to be made quarterly, *each contingent, as to possession and enjoyment,*

> upon the happening of an event named in the will, to wit, that the legatee should be alive when the payments are to be made." 147 Fed., 114, 122.

Another reference to the opinion of this court in Vanderbilt's case is as follows:

> "It will thus be seen that the argument of the court was intended to support the contention that the war revenue act imposed no duty upon legacies of personal estate on the ground that they were technically vested, but only upon such legacies when they came into actual possession and enjoyment, and that the turning over of such a legacy to the beneficiary, and the payment of the tax were intended to be contemporaneous." 147 Fed., 114, 122.

The Government's application to this court for a writ of certiorari to bring Disston's case here for review was denied on October 21, 1907 (207 U. S., 587).

In stating the question decided in Lynch *vs.* Union Trust Company (164 Fed., 161) the Circuit Court of Appeals for the Ninth Circuit adopted the language of counsel for the Government in that case, which was—

> "Whether a tax may be imposed, under the provisions of the war revenue act, upon the right to receive the income from personal property left in trust for a certain period, which period terminated after the repeal of the war revenue act." 164 Fed., 161, 162.

That case was heard in the circuit court by Judge Morrow and in the Circuit Court of Appeals by Judge Gilbert, Judge Ross and Judge Van Fleet. The Government's contention was condemned by the circuit court and the decision was affirmed on the appeal. It is important to note that the circuit court's decision was rendered on August 23, 1906, that is, only forty-five days after the decision of the Circuit Court of Appeals for the Third Circuit in Disston *vs.* McClain, *supra,* and that it contains no intimation that the decision

in Disston's case had been brought to the attention of the court. Therefore, it is fair to assert that the circuit court, in deciding Union Trust Company *vs.* Lynch (148 Fed., 49), reached its conclusion that the reasoning of this court in Vanderbilt *vs.* Eidman, *supra,* was applicable to the case then at bar quite independently of the similar views of any other court. Judge Morrow's oral opinion contains the following:

> "In the Vanderbilt case that method of determining a taxable legacy has been condemned with respect to the *corpus* of the estate * * * If it is not the law with respect to the *corpus* of the estate, it is not the law with respect to the income of the estate, because there is no discrimination in the statute between the income and *corpus* of the estate." 148 Fed., 49, 55.

The opinion of the Circuit Court of Appeals, in sustaining the decision just quoted from, was delivered by Judge Van Fleet, who referred to Vanderbilt *vs.* Eidman, *supra,* and Herold *vs.* Shanley (146 Fed., 20), as follows:

> "It will be observed that in neither of these two cases was the precise question presented in the case at bar involved; the only question being, as above suggested, the right to tax the residuary interest passing to the legatees. The cases are valuable, however, as furnishing an authoritative declaration of the scope and purpose of the act and the rules to be observed in its application." 164 Fed., 161, 165.

And, at a later point in the opinion:

> "Moreover, as held in Vanderbilt *vs.* Eidman, the purpose of the act was to subject to taxation only beneficial interests, which by reason of being absolutely vested in possession or enjoyment have a value capable of being definitely ascertained—'actual value' as expressed in section 29, or 'clear value' as expressed in section 30. The estate or interest here sought to be taxed was very clearly not of that character." 164 Fed., 161, 167.

The court rejected, as wholly immaterial, the claim of Government's counsel that there was an equitable interest in the trust fund, declaring that the statute indicated no purpose to reach such interests.

> "Confessedly, the only present right passing to these beneficiaries was that of receiving the income from the *corpus* of the estate in the hands of the trustees. Such an interest does not, for the reasons aptly stated by Judge Gray in Disston *vs.* McClain, fall within the definition of either a legacy or a distributive share, in the sense in which those terms are employed in the act. It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries." 164 Fed., 161, 166.

In this case, also, the Government applied for a writ of certiorari, and its petition was denied on May 17, 1909 (214 U. S., 523; 53 L. Ed., 1067).

And in the case now at bar the Court of Claims (45 C. Cls., 362), speaking through Judge Barney, took the same view, saying, in part:

> "The question of the legality of the tax levied on the appraisement of Alfred G. Vanderbilt's right to the beneficial enjoyment of the income of the residuary estate until he was thirty years of age was not before the court for decision." 45 C. Cls., 362, 370.

> "While, therefore, the able opinion of Mr. Justice White in that case does not directly decide the particular point in question in the case at bar, we think its reasoning does so by implication. Without attempting a complete analysis of the opinion it appears to us to distinctly decide that the War Revenue act (act of June 13, 1898, *supra*), did not impose duties upon legacies which were vested merely within the technical meaning of that term, but only upon legacies which were vested in *actual possession and enjoyment;* and that by the terms of that stat-

> ute and its amendments the turning over of such legacy to the beneficiary and the payment of the tax were intended to be contemporaneous." 45 C. Cls., 362, 371.
>
> "Therefore, both upon legal principles governing the construction of statutes, as well as authority, if the allegations of the petition are sustained, we believe the plaintiff is entitled to recover judgment prayed for, and the demurrer is overruled." 45 C. Cls., 362, 373.

It will be contended, we presume, by counsel for the Government, that a contrary view as to the principle controlling the decision in Vanderbilt *vs.* Eidman, *supra,* was held by the Circuit Court of Appeals for the Eighth Circuit and resulted in its decision in Westhus *vs.* Union Trust Company (164 Fed., 795; motion for rehearing denied, 168 Fed., 617). An examination of the extended opinion in that case is, however, destructive to such a contention. It shows that the interest and attention of the court centered upon the question, thereafter presented to this court in Hertz *vs.* Woodman (218 U. S., 205; 54 L. Ed., 1001), and that, although the taxation of rights to receive income during the beneficiary's life from a trust fund was involved, the court did not consider that question in the light of the decision in Vanderbilt's case. The single paragraph in the opinion which refers in any way to the question now at bar (164 Fed., 795, 797-798) also discusses the question which appears most to have attracted that court, and contains no reference to the decisions in Vanderbilt *vs.* Eidman, *supra,* Disston *vs.* McClain, *supra,* or Union Trust Company *vs.* Lynch, *supra.* Nor is there any reference to any of these cases or to the question now in issue in the discussion in the *per curiam* opinion denying a rehearing (168 Fed., 617). Moreover, there has been no final decision in the Westhus case; the decision of the Circuit Court of Appeals reversed a decision of the circuit court overruling the Government's

demurrer, the plaintiffs later amended their petition in the circuit court, and after a second demurrer was sustained and judgment entered they took an appeal which is now pending.

TWELFTH. AFTER THE DENIAL OF THE WRIT OF CERTIORARI IN DISSTON VS. MCCLAIN, SUPRA, THE TREASURY DEPARTMENT ACCEPTED THAT CASE AS SETTLING THE LAW AS TO COLLECTIONS IN RESPECT TO ANNUITY RIGHTS EXTENDING BEYOND JULY 1, 1902, AND PROCEEDED TO PAY CLAIMS FOR THE REFUNDING OF SUMS SO COLLECTED AS THEY WERE PRESENTED. IN VIEW OF THE SUBSTANTIAL IDENTITY OF THIS CLASS OF RIGHTS WITH THE RIGHTS OF MARY WADLEIGH STOKES THE PRESENT CASE CALLS FOR THE APPLICATION OF THE RULE THAT AN INTERPRETATION OF A TAXING STATUTE WHICH WOULD RESULT IN INJUSTICE WILL BE AVOIDED.

The rights of Mary Wadleigh Stokes were assessed by the Commissioner of Internal Revenue for the purposes of the pretended tax, *as though she had received an annuity* of $4,312.15 (Record, p. 31). The "present worth" of her rights was determined by multiplying $\$17.20\frac{225}{1000}$ by $4,312.15, the factor $\$17.20\frac{225}{1000}$ having been obtained from the column headed "ANNUITY, or present value of one dollar at the end of each year during the life of a person of specified age" in the tables arbitrarily adopted and promulgated by the Commissioner of Internal Revenue (Record, pp. 15 and 31). It is true that in order to reduce the rights now in question to the *form* of an annuity it was necessary to make one more arbitrary assumption, namely, that the trust fund would produce exactly four per centum per annum, than was necessary in applying the alleged tax to an actual annuity. But, the substantial fact being that these rights were *arbitrarily transformed into an estimated annuity,* it can scarcely be advanced in *support* of the propo-

sition that they were intended to be taxed; *although genuine annuities were not* within the intent of the taxing statute. The idea that Congress could have had in mind a narrow distinction of this sort and intended to tax one class of interests and not the other is, as will presently appear, a very recent development of the administrative view. Disston *v.* McClain, *supra,* was, of course, an annuity case. Yet the identity of the case now at bar with that case was asserted by Assistant Attorney-General Van Orsdel in the letter to Messrs. McGowan, Serven & Mohun, dated June 26, 1907, which is printed on page 10 of the present record. The full text of this letter follows:

> "In reply to your favor of the 25th instant, I would inform you that I have carefully examined the petition filed by you in the case of the Fidelity Trust Company, as executor and trustee under the will of Walter H. Tilden *vs.* United States, No. 30,020, and am satisfied that the questions involved are identical with those involved in the case of Disston *vs.* McClain (147 Fed., 114), and I will, therefore, take no steps in your case until the Disston case has been decided by the Supreme Court."

Similar views seem to have been held by the Secretary of the Treasury, for in the Attorney-General's letter to that officer, dated March 11, 1907 (26 Op. Att'y Gen'l, 194), the following statement is repeated as having been made the basis of the Secretary's inquiry:

> "The Circuit Court of Appeals in the Disston case held, in effect, that a life estate, or an estate for years, could not be taxed, except in so far as the income from that estate had become vested in the possession of the life tenant prior to July 1, 1902." 26 Op. Att'y Gen'l, 194, 196.

The decision of the Circuit Court of Appeals in Disston's case was rendered on July 9, 1906, and the Government's petition for a writ of certiorari denied on October 21, 1907

(207 U. S., 587). In his petition for that writ the Solicitor-General squarely asserted that the question now at bar had been decided in the case for which he was seeking a review. He said, in part:

> "The decision * * * involves the question of the taxability of an interest for life in personal property passing by will under the War Revenue Act of June 13, 1898, as amended or construed by the act of June 27, 1902." October Term, 1907, No. 336, Petition for Writ of Certiorari, p. 1.

His statement also includes the following:

> "The Circuit Court of Appeals held in substance, reversing thereby the circuit court, that no part of a legacy consisting of a life interest in personal property was taxable beyond that portion of such interest which became absolutely vested in physical possession prior to July 1, 1902, the date of the repeal of the War Revenue act, on the grounds that sections 29 and 30 of the latter act as amended, related to definite and defined amounts of personal property; that the bequest in this case amounted to a series of legacies vesting in possession or enjoyment at stated intervals, each being contingent upon the life of the beneficiary, and that the tax could attach to each of the series only as it rested in the physical possession of the legatee; * * * that there is no authority in the law for the use of life or annuity tables in arriving at the present or 'clear value' of life interests, and that if such a delegation of legislative power was intended it was not valid." Petition, pp. 1-2.

And again:

> "So that the case presents the general question of the taxability of a life estate or other estate less than a fee in personal property, * * *" Petition, p. 6.

In closing the petition the Solicitor-General seems to have given notice that its denial would be followed by the refunding, in accordance with the act of June 27, 1902, of all

sums collected under circumstances such as those of Rachael Asch and Mary Wadleigh Stokes. He had already said:

> "The question is important and is one upon which many other cases are pending." Petition, p. 6.

And he added:

> "There are a number of other subsidiary questions involved in this controversy; but on the main questions—the taxability of legacies of an interest for life or for years in personal property and the method of computing the tax upon such legacies—the fact that the Circuit Court deduced one conclusion from the decision in Vanderbilt *vs.* Eidman and the Circuit Court of Appeals exactly the opposite conclusion, together with the great amount of tax collected, *the refundment of which depends upon the determination of those questions,* constitutes, it seems, a strong reason why this court should review the case." Petition, pp. 12-13.

The same view was held by Attorney-General Bonaparte, who declined to comply with a suggestion from the Secretary of the Treasury that he should apply for a writ of certiorari in Union Trust Company *vs.* Lynch (164 Fed., 161), in a letter addressed to the Secretary of the Treasury and bearing the date of October 30, 1908. The full text of this letter is as follows:

> "Replying to your letter of October 14, in which you suggest the propriety of making an application to the Supreme Court for certiorari in the case of the Union Trust Company *vs.* Lynch, decided by the Circuit Court of Appeals for the Ninth Circuit adversely to the Government, I have the honor to say that in my opinion it is not advisable to apply to the court for the writ.
>
> "The decision of the Circuit Court of Appeals held that a tax under the war revenue act of 1898 is not validly imposed upon the right of a legatee to receive an income from the trust estate held by trustees and payable at certain intervals and until the beneficiary arrives at a certain age.

"The argument of the Government was that although legal title to the term was in the trustees, the beneficiaries had an equitable estate in the sum which had vested completely in enjoyment. The court held, referring to Vanderbilt *vs.* Eidman, 196 U. S., 480, and Herold *vs.* Shanley, 146 Fed. Rep., 20, but resting its decision chiefly on Disston *vs.* McClain, 147 Fed. Rep., 114, that the only present right of the beneficiaries was to receive the income from the corpus in the hands of the trustees and that such an interest does not fall within the definition of either a legacy or distributive share as those terms are employed in the act (sec. 29, act June 13, 1898, 30 Stat. L., 448-464); that while the periodical right to the income for a term of years may constitute an equitable interest in the trust fund, the act does not undertake to impose any burden upon such an interest.

"I may add that, as you were informed by my letter of May 20, 1907, I did not deem it advisable to apply for certiorari in the case of Herold *vs.* Shanley, and that in the case of McClain *vs.* Disston I submitted an application for the writ on May 27, 1907 which was denied by the court (207 U. S., 587)." In the Supreme Court of the United States, October term, 1908, No. 851, petition of the Fidelity Trust Company for leave to file a brief as a party interested and brief in opposition to motion for writ of certiorari, etc., pp. 3-4.

The Attorney-General's opinion that it was inadvisable to apply for a writ of certiorari in Union Trust Company *vs.* Lynch (164 Fed., 161), as expressed in the foregoing letter, seems to have been well considered, for, when, yielding perhaps to overpersuasion from faithful functionaries not thoroughly versed in the law, the Department of Justice subsequently changed its view and presented such a petition, this court promptly refused to let the writ issue (214 U. S., 523; 53 L. Ed., 1967).

But upon the denial of the writ of certiorari in Union Trust Company *vs.* Lynch, *supra*, the Secretary of the Treas-

ury declined to give the effect to the authoritative interpretation of the law, made final by that denial, which his predecessor under identical circumstances had accorded to the decision in Disston *vs.* McClain, *supra*. Therefore, the suit in which this appeal has arisen is, in fact, a suit to compel the Secretary of the Treasury to accord to Mary Wadleigh Stokes, the holder of rights to an indefinite income from a trust fund during her life, that meed of justice which was accorded to every member of another and very similar class of holders of rights also conditioned upon survival, namely, those who were given definite annuities payable out of income from trust funds.

The pretended taxes upon annuity rights have been refunded and that action of the Secretary of the Treasury is irrevocable. Justice demands that the pretended tax upon Mary Wadleigh Stokes' estimated annuity should also be refunded. The contingencies on which her rights depended were identical; her rights were no more "absolutely vested in possession or enjoyment" than theirs; every substantial element in her case is identical with theirs.

THIRTEENTH. THIS CASE BELONGS TO THE CLASS IN WHICH THE JUDGMENTS OF THE CIRCUIT COURTS OF APPEALS ARE FINAL UNLESS, IN A PARTICULAR CASE, THIS COURT ISSUES ITS WRIT OF CERTIORARI BRINGING IT HERE FOR REVIEW. THE COURT OF CLAIMS HAS LESS FINAL POWER. WRITS OF CERTIORARI WERE REFUSED IN DISSTON VS. MCCLAIN, SUPRA, AND UNION TRUST COMPANY VS. LYNCH, SUPRA. NOW TO INTERPRET THIS STATUTE SO AS TO EXCLUDE MARY WADLEIGH STOKES FROM THE RELIEF ALREADY ACCORDED TO THOSE WHO BENEFITED BY THE FINAL JUDGMENTS OF THE CIRCUIT COURTS OF APPEALS IN THE CASES NAMED WOULD BE MANIFESTLY UNJUST, AND INJUSTICE WILL BE AVOIDED.

The circuit courts of appeals have final appellate jurisdiction in cases like the present unless this court, in the

exercise of its discretion, sees fit to require the record in a particular case to be sent here in order that the judgment may be reviewed. Although the allowance of the writ for that purpose cannot be demanded as of right and lies wholly within the untrammeled discretion of this court, it is certain that the power is exercised in accordance with well-defined principles, for—

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeals." Forsythe *vs.* City of Hammond, 166 U. S., 506, 513; 41 L. Ed., 1095, 1098.

The principles controlling the allowance and denial of this writ were announced very soon after the creation of the circuit courts of appeals by the act of March 3, 1891 ("An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," 26 Stat., 826), and there has been no deviation therefrom. The application of Lau Ow Bew for a writ of certiorari was granted on November 16, 1891, and, in granting it, this court, speaking by the late Mr. Chief Justice Fuller, stated the questions presented by the petition as follows:

> "The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error." Ex parte: Lau Ow Bew, 141 U. S., 583; 35 L. Ed., 868, 870.

Again, in Forsythe *vs.* City of Hammond (166 U. S., 506; 41 L. ed., 1095, this court said:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the

circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this Nation in its internal or external relations, demands such exercise." 166 U. S., 506, 514-515; 41 L. ed., 1095, 1098.

To the same import are:

Ex parte Woods, 143 U. S., 202; 36 L. ed., 125, 126.

Lau Ow Bew *vs.* United States, 144 U. S., 47, 58; 36 L. ed., 340, 344.

Columbus Watch Company *vs.* Robbins, 148 U. S., 266, 270; 37 L. ed., 445, 447.

Warner *vs.* City of New Orleans, 167 U. S., 467, 474; 42 L. ed., 241.

Fields *vs.* United States, 205 U. S., 292, 296; 51 L. ed., 807, 810.

It may, therefore, be regarded as settled as a matter of law that writs of certiorari were denied in Disston *vs.* McClain, *supra,* and Union Trust Company *vs.* Lynch, *supra,* for one or the other or both of the two reasons given in *Ex parte* Lau Ow Bew, *supra,* that is to say, either because (first) the question was not of sufficient importance or (second) it was not "sufficiently open to controversy." In view of the repeated issuance of the writ in cases arising under the legacy tax provisions of the act of June 13, 1898, the idea that the first of these reasons could have controlled seems to be excluded. In other words the granting of the writ in Tilgh-

man *vs.* Eidman (203 U. S., 580), Philadelphia Trust, etc., Company *vs.* McCoach (205 U. S., 539), Norris *vs.* McCoach (205 U. S., 539) and United States *vs.* Marion Trust Company (206 U. S., 566; 51 L. ed., 1191), shows that the interpretation of the legacy tax provisions is of "sufficient importance" to require the issuance of the writ where the questions at issue are "sufficiently open to controversy." But it was also stated in the opinion in Forsyth *vs.* City of Hammond, *supra,* that the writ ought not to issue and hence would be denied in cases in which granting it would—

> "burden the docket of this court with cases which it was the intent of Congress to terminate in the courts of appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice." 166 U. S., 506, 513; 41 L. ed., 1095, 1098.

In the light of the foregoing, the situation presented by this appeal is startling and peculiar. The final decision of the Circuit Court of Appeals for the Third Circuit in Disston's case was rendered on July 9, 1906 (147 Fed,, 114), and certiorari refused on October 21, 1907 (207 U. S., 587); the final decision of the Circuit Court of Appeals for the Ninth Circuit in the Union Trust Company case was rendered on October 5, 1908 (164 Fed., 161), and certiorari refused on May 17, 1909 (214 U. S., 523). The record shows that in the case at bar the Government's demurrer in the Court of Claims was filed on February 16, 1910 (Record, p. 18); that the demurrer was argued in that court on March 7, 1910 (Record, p. 18); that the demurrer was overruled on May 2, 1910 (Record, p. 26); that the case was submitted on the merits on May 9, 1910 (Record, p. 27), and that the judgment was filed on May 11, 1910 (Record, p. 34). Thus it appears that except for the refusal of executive officers, persisted in for at least a year after the denial of the last application for a writ of certiorari, to accept as final a decision which the statute creating the Circuit Courts of Ap-

peals in terms makes final, the situation which has permitted this appeal could not have existed.

It is submitted that, in creating the Circuit Courts of Appeals, Congress could never have contemplated such a result. Those courts were created and their conclusions in certain classes of cases were made final in order to facilitate the administration of justice. It would be intolerable if, in all these classes of cases, the law must remain unsettled until, after repeated refusals by this court to exercise its right to supervise and control the otherwise final adjudications of those courts, a case might be presented to some court, like the Court of Claims, of less final authority, from which an appeal might be had, as of right, to this court. If, years after this court has declined to interfere, the precise principle of law involved in a final decision of a Circuit Court of Appeals is to be regarded as open, without reserve, in this court, on a direct appeal from the Court of Claims, then the supposed finality of the conclusions of the former is a delusion and their creation and existence constitute an impediment to that definition of the law which is essential to the prompt and efficacious administration of justice. All those reasons which operate to require that the principles of law applied by the judiciary in settling contests between parties shall not be reopened when the same question arises between other parties call upon this court, in this case, not to disturb the interpretation of the law which it declined to disturb when the several applications for writs of certiorari just cited were presented and denied.

FOURTEENTH. THE INTERPRETATION ASKED FOR, IN THIS CASE BY THE GOVERNMENT, WOULD RESULT IN INJUSTICE IN THAT IT WOULD SUBJECT TO TAXATION SOME INCOMES PAID LONG AFTER THE REPEAL OF THE LEGACY TAX ACT OF JUNE 13, 1898, WHILE OTHER INCOMES PAID AT THE SAME TIME, UNDER SIMILAR CONDITIONS, UNDER SIMILAR WILLS, WOULD NOT BE TAXED.

In Hertz *vs.* Woodman (218 U. S., 205; 54 L. Ed., 1001), the most recent case arising under the Federal legacy tax law of June 13, 1898, decided by this court, the majority of the court conceived that an "unreasonable result" and an "unjust discrimination," which Congress could not be understood to have intended, would flow from an interpretation which would exclude from taxation interests in the personalty of persons dying within twelve months of the repeal while the tax must be applied to similar interests in the personalty of persons dying prior to the beginning of that period (and, of course, after June 13, 1898), though the possesion and enjoyment of the legacies might accrue, in both cases, at the same time. Mr. Justice Lurton, for the majority, said, in part:

> "No one questions but that one effect of this saving clause would be to save any such tax as was 'due and payable' one year before July 1, 1902. This being so, it would be very unjust if the tax in the latter case is saved and the other remitted, inasmuch as the thing made subject to the tax would, in each case, be the same; namely, the transmission of a beneficial right to the possession and enjoyment of a legacy or distributive share at the death of a testator or intestate. In the one case, the tax paid upon the right passing by death would be preserved. In the other, a tax upon a like inheritance would be remitted. The only difference would be that, in one case, the time for payment had arrived, while, in the other, it had not, though, in the latter case, the ultimate obligation to pay was equally as certain and fixed as in the first case. 218 U. S., 205, 220, 221; 54 L. Ed., 1001, 1008.

Words could not be more aptly chosen and arranged than the foregoing, to portray precisely the injustice which would spring from accepting the interpretation now asked for by the Government. Mary Wadleigh Stokes paid a sum claimed as a tax on her rights to receive quarterly payments,

should she survive, during each year from 1899 to 1929 (Record, pp. 29-31), which payments were to be measured in amount by the income from a trust fund amounting to $120,303.94, but out of which income there was first to be deducted an annuity payable to another in the sum of $500 (Record, p. 31). So, if the Court of Claims should now be reversed, she would be taxed on account of income not possessed or enjoyed by her until after the repeal of the taxing law, that is to say, not paid to her until after July 1, 1902. The sole ground on which this tax is claimed is that her testator died on March 16, 1899, that is to say, between June 13, 1898, and July 1, 1902, the respective dates of the enactment and the repeal of this tax. Now during all these years from 1902 to date and during the years that are to follow up to the year 1929, many other persons have received and will receive income in similar amounts, provided from the earnings of trust funds, created for their benefit by testators dying prior to June 13, 1898, or after July 1, 1902. These incomes are, admittedly, not subject to Federal legacy taxes.

The unjust selection for taxation of some incomes paid from trust funds created by will, while excluding other similar incomes arising in the same way, and paid at the same time, would not, however, consist wholly in taxing those provided by testators dying between June 13, 1898, and July 1, 1902, and exempting others. Many incomes provided out of the earnings of trust funds created by testators who died between those dates, that is, while the taxing law was in force, are acknowledged to be exempt from taxation even though the persons to whom they passed did not belong to the exempt classes. Alfred G. Vanderbilt, if he is still alive, must be at this date in receipt of the income from $9,486,058.73, the half of the trust fund provided by his testator, who died on September 12, 1899, which was not to be paid to him until he reached the age of thirty-five years, and the tax claimed and collected, in part, on his rights to receive this income has

been refunded (196 U. S., 480, 481-482; 49 L. Ed., 563, 564). If he survives a few months more, he will receive $9,486,058.73, on which the tax payment was refunded.

There are many so-called "life estates" in personalty which, while determinable upon the death of the beneficiary, or some other person, are also determinable upon the happening of some other contingency should it occur before the death. These are as much "life estates" as those in which death is the only determining contingency. Many such rights were undoubtedly created by testators who died while the law of June 13, 1898, was in force, and all of them have been exempted from this taxation except as to the amounts of income actually earned and paid to the beneficiaries prior to July 1, 1902. The case of Herold *vs.* Shanley (146 Fed., 20) illustrates this class of "life estates," although the additional contingency there considered is by no means the only one by which the contingency of death is frequently supplemented. In that case the tax was claimed in respect to rights to receive income from a trust fund which was to be held intact until the death or remarriage of the testator's widow, and upon the happening of either event was to be distributed.

The decision in the Circuit Court for the District of New Jersey (141 Fed., 423), which was affirmed by Circuit Judges Dallas and Gray and District Judge McPherson, sitting as the Circuit Court of Appeals for the Third Circuit, contains the following:

> "The interests in question of the legatees were determinable not only by the death of the widow, but also by her remarriage. It is apparent therefore that the interests might terminate at any time, and that there is consequently no way to fix or determine their present value. No tables have ever been calculated which will show the time, when, if ever, a widow will remarry (Dunbar *vs.* Dunbar, 190 U. S., 345, 23 Sup. Ct., 757; 47 L. ed. 1084). Congress might possibly have established an arbitrary rule of valuation in such cases; but it has not done so, and it is

useless to speculate as to whether or not such legislation would have been valid had it been enacted. There must be, however, some method by which these estates could be valued with reasonable certainty, if this taxation is to be supported. No taxation can rest upon a haphazard or guess-work valuation, but that in our judgment is the only foundation upon which the property interests under consideration were taxed. Their clear value was not and could not have been ascertained. Under the circumstances we think the only method open to the Government was to tax the income received by the legatees when, and as, it should be received." 141 Fed., 423, 428-429.

By the suit in which the decision from which the foregoing has been extracted was rendered the plaintiffs recovered the sum of $108,586.15, of which $15,052.41 was interest from the date of payment of the pretended tax. They had paid $97,936.63, and the circuit court gave judgment in their favor for $93,533.74 plus interest, as above stated (141 Fed., 423). The plaintiffs did not appeal, so that the small portion of the tax payment covered by the claim of the collector which was allowed was not in issue in the Circuit Court of Appeals (146 Fed., 20, 21). Of the sum so retained $475.34 was collected upon the rights of an infant of seven years, with an alleged "life expectancy" of nearly forty years, to receive the income of $100,000 during his life or until he reached the age of twenty-one, which, if he lives, will occur in the year 1914 (141 Fed., 423, 426); *the balance was collected upon income actually paid to the "life tenants" prior to July* 1, 1902.

No application was made by the Government for a writ of certiorari to review the decision of the Circuit Court of Appeals in the foregoing case, and therefore it may be assumed that it has been accepted as a rule for the guidance of the administrative officers of the Treasury Department.

This court, in Knowlton *vs.* Moore (178 U. S., 41; 44 L. Ed., 969), found substantial support for its judgment in considering the injustice which would result from taxing—

> "the separate legacies, not by their own value, but by that of a wholly distinct and separate thing." 178 U. S., 41, 76; 44 L. Ed., 969, 983.

One example was suggested as follows:

> "The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus a person dying, and leaving an estate of $10,500, bequeaths to an hospital $10,000. The rate of tax would be five per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other." 178 U. S., 41, 76; 44 L. Ed., 969, 984.

It is respectfully submitted that equally gross inequalities, equally impossible to impute to the fair intention of Congress, would result if the "same person, occupying the same relation, and taking in the same character two equal sums from two different persons," both dying while the Federal legacy tax was in force, such sums being payable annually, one during the life of some third person and the other during the life or until the remarriage of the same person, were taxed on one sum and not on the other; or if Alfred G. Vanderbilt's income from $9,486,058.73 were untaxed and Mary Wadleigh Stokes' income from less than $120,000 were taxed; or if the latter were taxed on income paid (say) during the year 1910 because her testator died between 1898 and 1902, and others receiving the same amount in the same way, whose testators died before 1898 or after 1902 were not taxed. Some of the similar incomes that would go untaxed may be smaller than that involved in this case; many of them are undoubtedly larger. But Mary

Wadleigh Stokes, if she still lives, may well insist that the lingering touch of a long-repealed statute shall not be permitted to impair her modest income while the equal or greater incomes of others are allowed to go free.

FIFTEENTH. THE WORDS AND PHRASES NECESSARY TO IMPOSE THE TAX UPON RIGHTS, PASSING BY WILL OR INTESTATE LAWS, TO RECEIVE INCOME FROM PROPERTY, WERE WELL KNOWN AND HAD FREQUENTLY BEEN USED, AT THE TIME OF THE ENACTMENT OF THE WAR REVENUE ACT OF JUNE 13, 1898, AND SUBSEQUENT AMENDMENTS, AND IF IT HAD BEEN THE PURPOSE OF CONGRESS TO TAX THESE INTERESTS THE NECESSARY EXPRESS TERMS WOULD HAVE BEEN USED.

Excepting only the power to compel personal service in time of war or for the preservation of the peace, the power to tax is the most essential and the most arbitrary power which can exist in a free government. Neither has any justification save that without it no government would have the power of self-preservation, and in that respect both are equally requisite to the existence of any government. The exercise of both powers must be left largely to the legislative discretion, for any attempt materially to restrict either creates the danger that it may prove to be inadequate when reliance upon it becomes most necessary. Therefore the taxing power of Congress is wide in scope, and the constitutional limitations which have been attempted are not such as greatly to restrict its exercise. But, in consideration of the arbitrary character of the power, it is the appropriate and fortunate rule—

> "that the sovereign is bound to express its intention to tax in clear and unambiguous language." Eidman *vs.* Martinez, 184 U. S., 578, 583; 46 L. Ed., 697.

It has repeatedly been noted that sections 29 and 30 of the act of June 13, 1898, contain no indications of a Congressional purpose to tax merely technical interests in per-

sonalty or mere conditional rights to receive future payments, which rights will never be realized should some named contingency intervene. Thus, in Vanderbilt *vs.* Eidman, *supra:*

> "Moreover, the meaning of the statute, fairly to be deduced from the reiteration in each of the five paragraphs of the beneficial interest and clear value as the subject of the tax, is greatly strengthened by the inference to be drawn from the fact that nowhere in the section is there contained language referring to technical estates in personalty, or treating them as subjects of taxation, despite the absence of the right to immediate possession or enjoyment." 196 U. S., 480, 494.

> "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached." 196 U. S., 480, 495.

The absence of language expressing an intention to tax defeasible rights to receive income influenced the decision of the Circuit Court of Appeals for the Third Circuit in Disston *vs.* McClain, *supra.* In the opinion in that case Judge Gray said:

> "The statute nowhere refers in express terms to the interest or income of a legacy, nor does it impose any tax in respect thereto, before it is actually received." 147 Fed., 114, 122.

And again:

> "If the act had intended that the interest in a fixed and definite income for life, payable out of personalty alone, much more in such an income payable *out* of the total income of the whole residuary real and

personal estate, should be taxed, this intention would not be left to inference, but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done in the collateral inheritance tax laws of the States of New York and New Jersey." 147 Fed., 114, 122.

The Circuit Court of Appeals for the Ninth Circuit, in Union Trust Company *vs.* Lynch, *supra,* also took note of this most significant omission, saying:

> "It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the act undertake to impose any burden upon such an interest? Very clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual, and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose." 164 Fed., 161, 166-167.

The foregoing citations merely express the well-established rule that where the language necessary to express a particular legislative purpose is well known and has been frequently used, the intention to accomplish that purpose will not, in the absence of the express terms or their plain equivalents, be found by implication. The late Mr. Justice Brewer, speaking for the majority of this court in Interstate Commerce Commission *vs.* Cincinnati, New Orleans & Texas Pacific Railway (167 U. S., 479; 42 L. Ed., 243), said, in part:

"The power itself is so vast and comprehensive, * * * the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. * * *

* * * * * * *

"The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." 167 U. S., 479, 494-495, 505; 42 L. Ed., 243, 251, 255.

The principle declared in the foregoing is at least as strongly applicable in the present case as in a case involving the exercise of the regulative power of Congress over interstate commerce; many may regard it as much more strongly applicable.

The legacy tax laws of the following States, all adopted prior to the passage of the act of June 13, 1898, contain words apparently sufficient to subject rights to future income payments to taxation which Congress might readily have employed had its purpose comprehended such interests. Thus the "Transfer Tax Act" of the State of New York, adopted in 1892 (Laws of 1892, ch. 399) provides a tax subject to named exemptions, on all transfers of real or personal property by will or under the intestate laws of that State and declares (section 1, paragraph 3) that:

"Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession *or expectancy*, to any property *or the income* thereof by any such transfer, * * *"

In New Jersey the law reads:

"After the passage of this act all property which shall pass by will or by the intestate laws of this State * * * and all property which shall be

within this State, and any part of such property, and any interest therein *or income therefrom,* which shall be transferred by inheritance, distribution, bequest, devise, * * * to any person or persons, or to a body politic or corporate * * * in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession *or expectancy,* to such property, *or to the income thereof,* * * * shall be subject to a tax * * *" Ch. 210, Laws of 1894, p. 318.

The direct-inheritance tax law of Ohio, passed on April 20, 1894, is made applicable to—

"All property within the jurisdiction of this State, and any interest therein, * * * and whether tangible or intangible, *including annuities,* which shall pass by will or by the intestate laws of this State, * * *" Laws of 1894, p. 166.

The California statute imposes the tax whenever, with certain exceptions, by reason of the passing of property by will or under the intestate laws—

"Any person or body politic or corporate shall become beneficially entitled in possession *or expectancy,* to any property *or to the income thereof,* * * *" Laws of 1893, ch. CLXVIII.

The Illinois statute, so far as now material, reads:

"All property, real, personal and mixed, which shall pass by will or by the intestate laws of this State * * * to any person or persons or to any body politic or corporate in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession *or expectation* to any property *or income thereof,* shall be and is subject to a tax * * * When the beneficial interests to any property *or income therefrom* shall pass to *or for the use of* * * * the rate of tax shall be * * *" James B. Blackwell, Laws of Illinois, p. 213.

Only four years before the enactment of the War Revenue act of June 13, 1898, Congress itself had treated rights such

as those received by Mary Wadleigh Stokes as accretions to income and *in such a way as necessarily to exclude the idea that they were to be taxed as an entirety,* for among the income tax provisions of the act of August 27, 1894 (28 Stat., 509), was the following:

> "SECTION 28. That in estimating the gains, profits, and income of any person there shall be included all * * * money and the value of all personal property acquired by gift or inheritance; * * *." 28 Stat., 509, 553.

We apprehend that no one will suggest that had the foregoing provision of law been in force instead of the act of June 13, 1898, the income tax could have been properly charged against Mary Wadleigh Stokes as though she had received in the year of her testator's death, or at the settlement of his estate, an addition to her income, by his bounty, of $78,678.68. We conceive that there would have been no thought except that she was to pay the tax *upon the income received from the fund provided by her testator as and when that income was actually paid to her.* Yet, if the contention that the language of the income tax act of 1894 was intended to treat gifts of this class as an entirety would have been unsound, it must be equally unsound to assume that similar language used four years later in another taxing act was intended to have that effect.

More persuasive still that had Congress intended to tax rights to future income payments it would not have failed to make its purpose clear, is the fact that it had before it and used, as a model for the act of 1898, the act of 1864 (13 Stat., 223), sections 124 and 125 of which (13 Stat., 285-287) provided for taxes on legacies and distributive shares and sections 126 to 150 of which (13 Stat., 287-291) provided for taxes on successions to real estate.

> "That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is

concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866." Knowlton *vs.* Moore, 178 U. S., 41, 69.

Whoever had before him the act of 1864 must, obviously, have had before him not only the legacy tax provisions contained in sections 124 and 125, but also the succession tax provisions of sections 126 to 150. He knew, therefore, that section 127 (13 Stat., 287-288) which belongs to the *succession tax* portion of the statute, contains terms aptly chosen and fully efficacious to include future income rights and that *no such terms can be found in the legacy tax portion.* We quote:

> "SECTION 127. That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession *or expectancy,* to any real estate, *or the income thereof,* upon the death of any person dying after the passing of this act, shall be deemed to confer, on the person entitled by reason of any such disposition, a 'succession;' * * *"

And in section 137 the act of 1864 provided:

> "That the duty imposed by this act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession, to his succession, *or to the receipt of the income and profits thereof,* * * *"

And further, in section 141:

> "That in estimating the value of a succession no allowance shall be made in respect of any contingency upon the happening of which the real estate may pass to some other person; but in the event of

> the same so passing, the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest: * * *"

Section 144 provided for fixing the rate of interest to be used when future interests were to be valued. These are all *succession* tax sections. There are no provisions parallel to the foregoing in sections 124 and 125, the sections of the act of 1864 *imposing taxes upon legacies and distributive shares of personal property.* As the legacy and succession taxes were supplementary features of the same act, the irresistible inference from the omission of these definite provisions as to future income rights in the legacy tax sections and their inclusion and elaboration in the succession tax provisions is that in the one case Congress did not intend and in the other it did intend to tax such rights. That *the legacy and succession taxes of 1864 were not intended to act upon precisely the same classes of interests* in personal and real property, respectively, is clearly proven by the fact that legacies and distributive shares passing to both *husbands* and *wives* of deceased persons were exempt from taxation (13 Stat., 286), while as to the succession tax there was no exemption as to *husbands* of decedents, successions to wives only being exempt (13 Stat., 289 and 481). Reason for the more far-reaching purpose found in the succession tax portions of the law of 1864 exists in the fact that this tax was established in view of the extreme necessities of that year. The legacy tax had been established in 1862 (12 Stat., 432, 485). In seeking more revenue, in 1864, Congress added a new tax on successions to real estate but took for granted that the legacy tax of 1862 had been applied as fully as such a tax ought to be applied, and *revised it no further than to increase the rates.* In consideration of the foregoing it would be impossible to hold that the act of 1864 was intended to tax interests in personalty

such as those taken by Mary Wadleigh Stokes and in issue in this case, and, if that is true of the act of 1864, it must also be true of the act of 1898.

> "Observing closely the text, it is apparent that the clause therein which points out what is taxed is an exact copy of the act of 1864, except the substitution of the 'ten' for the word 'one.' The subject taxed, therefore, under the present act is the same which was taxed under the act of 1864. This is the equivalent of a mathematical certainty." Knowlton *vs.* Moore, 178 U. S., 41, 70-71.

SIXTEENTH. CONGRESS CANNOT BE ASSUMED TO HAVE INTENDED TO TAX FUTURE INTERESTS WHICH, AS THEY WOULD BE DEFEATED BY THE HAPPENING OF A CONTINGENCY THAT MIGHT OCCUR AT ANY TIME, COULD HAVE NO "ACTUAL" OR "CLEAR" VALUE, WHICH, IN FACT, MIGHT HAVE NO VALUE AT ALL, AND AS TO WHICH THE ONLY POSSIBLE METHOD OF "VALUATION," SO-CALLED, REQUIRED THE ARBITRARY APPLICATION OF MORTUARY TABLES.

Future payments can be assigned a "present value" only by the assumption that the use of money is, and will continue to be, worth a certain rate of interest, compounded at certain intervals. If, further, the payment is not certain to be made, but depends upon the happening or non-happening of a contingency, the "present value," so-called, can be estimated only by resort to the "doctrine of chances." When the contingency is that of the continuance of a human life the "doctrine of chances" indicates reference to some one or another of the numerous statistical compilations and computations commonly referred to as "mortuary tables," "experience tables," or "expectancy of life tables." The Government formerly claimed the right to tax, under the act of June 13, 1898, two classes of future payments, these being:

> "First. Payments consisting of all or part of the *principal* of a fund.
> "Second. Payments consisting of all or part of the *income* of a fund."

Claiming the right to tax such future payments, it was, of course, necessary to claim the right to assess them by resort to an arbitrarily assumed rate of interest and arbitrarily *selected* mortuary tables. After the decision in *Vanderbilt's* case, *supra,* the Government *abandoned these claims as to all future payments of the first class,* that is, those consisting of all or any part of the *principal* of a fund. After the decision of the Circuit Court of Appeals in *Disston vs. McClain, supra,* and the denial of certiorari by this court, the Government *abandoned these claims as to future payments of the second class,* that is, future payments consisting of all or part of the *income* of a fund, *so far as definite annuities were concerned.* Therefore, if in the present case it shall be decided that the future payments to be made to Mary Wadleigh Stokes after July 1, 1902, were not properly taxed, the last portion of the last class of future payments will have been relieved from the claims made by the Government and *the last necessity for the use of mortuary tables or an arbitrarily assumed rate of interest will have been avoided.*

By the use of the term "actual value" in the first sentence of section 29 of the act of June 13, 1898, in which the subject-matter of the tax is defined, and by the five times repeated use of the term "clear value" in the paragraphs of the same section which indicate the basis of assessment, as well as by the repeated use of the latter term in section 30, Congress plainly indicated its purpose to impose the tax with relation to such interests only, as would have, at the time at which the tax was imposed in respect of each of them, both "actual" and "clear" value. It would be impossible to assign meanings to the words "actual" and "clear," as thus used to define "value," which would not most widely separate the sort of value sought from any conclusion that could be reached by the use of mortuary tables. The record shows that the collector pretended to "value" the interest of Mary Wadleigh Stokes by assuming that she would live just 30.205 years longer as that is the "expectancy of life" of a person twenty-nine years of age, according to the particular tables with

which he had been furnished. This method of so-called "valuation" was not provided for in the act of June 13, 1898, or any of its amendments, but was devised by the Commissioner of Internal Revenue because he conceived that legacies which were not made presently payable, and might never be paid, were taxable and, if they were, it was obviously necessary to provide some general method for their assessment. The suggestion made by appellees is, however, that if Congress had intended to tax such interests before their definite value could have been ascertained it would have provided some method for their "valuation" and would not have alluded to the result by the inconsistent terms "clear value" and "actual value." The present force of this suggestion is much strengthened by the fact that although the same method of "valuation" could be applied, without any greater likelihood of erroneous results, to other interests, and was for a time so applied, the class of payments now presented is actually the last remaining class as to which the propriety of that method is still asserted. That all the other classes were not taxable on their "present worths" is now admitted.

The collection which this court condemned in Vanderbilt's case was not measured upon a "valuation" dependent upon the use of mortuary tables. The collector made use of such tables only to ascertain that they showed that Alfred G. Vanderbilt "had a life expectancy beyond the ages of thirty and thirty-five years," concluding, from that fact, that the Government was entitled to assume, for the purposes of this tax, that he would live, at least, to the latter age (196 U. S., 480, 483; L. Ed., 563, 564). This conclusion seems to have been, in effect, that a contingency might be treated as eliminated or satisfied, for taxation purposes, if approved statistics indicated *a preponderance of chances* favoring its ultimate satisfaction. It was somewhat less forced than in the present case, for, assuming the accuracy and the applicability to the special life in question of the tables used, there was nothing but *an even balance of chances* that Mary Wadleigh Stokes would live 30.205 years from the death of her

testator, for the "expectancy of life" disclosed for any age by such tables is merely the average number of years survived by persons who attained that age out of the whole number recorded in the "experience tables." But the use of the mortuary tables shown in that case was condemned by this court.

Mortuary tables were used, precisely as they were used in the case at bar, in Herold *vs.* Shanley (146 Fed., 20), in Disston *vs.* McClain, *supra;* Herold *vs.* Kahn (159 Fed., 608), and in Union Trust Company *vs.* Lynch, *supra,* and in deciding each of these cases the Circuit Courts of Appeals, to which they were presented, declared such use to have been unauthorized and improper.

> "It may be added, however, that the method of calculation adopted by the collector was also objectionable because * * * the value of the residuary estate bequeathed to the sons was *estimated by the use of mortuary tables, for which use we fail to find any authority in the statute.* Still further, if the use of mortuary tables were permissible in a proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and, while the probability of death may perhaps be approximately estimated from the recorded experience of insurance companies, there are as yet no statistics available from which the probability of remarriage may even be conjectured." Herold *vs.* Shanley, 146 Fed., 20, 24.

> "To create the *corpus* of a legacy, the income of which will supply these definite quarterly payments, would impose upon the trustees the necessity of setting apart such an amount of money as would, in their judgment, produce the income, thus creating a principal sum or *corpus* which the testator has not seen fit to create in the shape of a legacy, and to so create it by the mere exercise of a judgment which may prove mistaken in its results. *The sum thus arbitrarily estimated,* the collector assumes the right of appraising as the legacy of a life estate in personal property, the *present value* of which, for the purposes of

taxation, *is to be ascertained by rules and methods not designated in the taxing law, nor, as we think, authorized or contemplated thereby.*" Disston *vs.* McClain, 147 Fed., 114, 117-118.

"*In this statute, there is no mode provided for valuing such an income given to a person for life. The mode adopted by the collector in this case is entirely unauthorized by the statute,* for he did not estimate by life tables the value of a life estate in a designated and ascertained fund, but by an exercise of his arbitrary judgment, proceeded to ascertain or create the fund that would produce the income, though it had not been ascertained or designated by the testator, and then *proceeded to value it by the use of life tables.* The provision in section 30 of the act of 1898, relied upon by the collector as an authorization of the procedure adopted by him, is not, in our opinion, clear and precise enough to sanction it." Disston *vs.* McClain, 147 Fed., 114, 122-123.

"No question is made in this respect, and it is therefore assumed that Mrs. Wertheim, under this provision of her father's will, had a beneficial life interest in the *corpus* of the fund or estate, the income of which she was to enjoy during her life. * * * No method of assessing the value of such a life interest is prescribed by the statute of 1898." Herold *vs.* Kahn, 159 Fed., 608, 613-614.

"It was necessary for the collector, therefore, * * * to * * * resort, not only to the use of life or mortality tables, but to employ an arbitrarily assumed rate of interest in making the computation. We are entirely satisfied that, whether the employment of mortality or life tables under any circumstances is contemplated by the act, the mode resorted to in this case was not such as to produce the 'actual' or 'clear' value therein specified. In using those terms Congress must be deemed to have meant something more definite and certain than would be attached to the bald term 'value,' without the qualifying adjectives. A thing may have value in a general sense, although that value may not be susceptible of ready

> or definite ascertainment. It may depend upon some uncertainty or contingency. So that, when Congress employed the expressions 'actual value' and 'clear value,' it very evidently intended to convey the idea of definite or certain value—something in no sense speculative. Here it is at once apparent that the result reached as a basis for the tax through the method adopted was at most an approximation or merely speculative; and it could be nothing else. Life or annuity tables are never employed to ascertain definite or actual results, but as guides to a reasonable approximation. Vicksburg, etc., R. R. Co. *vs.* Putnam, 118 U. S., 545; 7 Sup. Ct., 1; 30 L. Ed., 257, and cases there cited." Union Trust Company *vs.* Lynch, 164 Fed., 161, 167.

So, too, in the oral opinion in Union Trust Company *vs.* Lynch, rendered in the circuit court (148 Fed., 49) by Judge Morrow, we find:

> "These actuary tables have reference to quite a different subject, and cannot be introduced here to determine the present value of an estate for taxation when such estate can only be taxed when it comes into the absolute possession of the heirs many years later. If it is not the law with respect to the corpus of the estate, it is not the law with respect to the income of the estate, because there is no discrimination in the statute between the income and corpus of the estate." 148 Fed., 49, 55.

The inference that Congress, while refraining from an express direction to use mortuary tables, still contemplated the taxation of rights which could be assessed only by their use loses all force when it is realized that *such tables indicate nothing as to the probable duration of a particular life.* To say that Mary Wadleigh Stokes had, at the date of her testator's death, an "expectation of life" of 30.205 years, was merely to say that the average duration, after that date, of a very large number of persons of her precise age then living and belonging to the classes represented in the data from

which the tables were calculated, would be 30.205 years. And, as that number of years represents an *average,* it follows that it must be the quotient obtained by dividing the sum of many different items by their number. The only thing reasonably and humanly certain, within the realm of finite comprehension, when "average expectancy of life" is applied to a life in being, is that the actual duration of that life will not coincide with the average. All human experience establishes the fact that the vast preponderance of chances excludes the probability of such a coincidence. And since mortuary tables were first contrived death has never claimed a single human being who, at the very moment of his demise, did not have, according to those tables, an expectancy of life not yet completed. It must be so for, by definition, the "expectancy" is the average duration, beyond an age attained, of all by whom it is attained. There can be no greater misuse of an average derived from a large or a small class than to assume that it is applicable to any individual in that class. The average height of a group consisting of a six-foot man and a four-foot boy is five feet, but there is no one in the class whose height coincides with the average.

The following extract is from "Insurance Statistics and Economics," by Frederick L. Hoffman, sometime president of the American Statistical Association and one of the foremost insurance actuaries in the United States, a book published in the year 1911 by The Spectator Company.

> "The term 'average life time' is often assumed to mean the individual expectation, or the number of years which a person may expect to live subsequent to a given year which has been attained, while in fact *the expression means the equal chance of a person to live or not to live* a given period of years, which is, of course, *a very different matter.*" Pp. 335-336.

So in the present case, the Government, in substance, contends that "actual" and "clear" value can be dependent upon

the measurement of an "equal chance to live or not to live." In the same work the author says:

> "The most erroneous use of the average is when the term is employed to forecast individual occurrences, or to verify individual predictions of individual events, which, if realized at all under such conditions, would be a mere matter of true accident or pure chance. *It is, in fact the very opposite of the function of the average to forecast any particular event, or the* occurrence of any particular contingency" (p. 336).
>
> "The thread of the individual life may at any moment be broken by any one of a thousand chances, which are lost in the aggregate, but emphasize the true course of Nature. 'How careful of the type she seems, how careless of the single life'" (p. 345).
>
> "*The theory of probability* has its scientific explanation and use, but it *has no practical value to the individual in his effort to forecast with certainty the occurrence of a specific event.* The theory of probability lies at the root of the vast business of insurance in all its branches, and being derived from the science of average, it meets the conditions of this business in the most admirable manner by equalizing losses and effecting a re-distribution of results. While *it is impossible to forecast the probable duration of a single life,* it is not at all difficult to predict with approximate accuracy the average duration of a sufficient number of lives" (p. 346).

Moreover, there are mortuary tables and mortuary tables and *it is customary for those who propose to use them to select the tables most effective to obtain the results they desire.* A recent official document (Senate Document No. 745, 61st Congress, 3d Session; Savings and Annuity Plan proposed for Retirement of Superannuated Civil-Service Employees) shows that at three different stages in the development of a proposed system of retirement annuities for civil employees of the Federal Government, three different sets of mortuary tables were used *because* they gave different results. We quote from this report the following:

"Three different mortality tables have been employed in the construction of the retirement plan proposed in this report; the British Offices' Select Annuitants' Mortality Table in connection with Part I, and the American Experience Table of Mortality, together with the Combined or Actuaries' Table of Mortality, in connection with Part II." Report, pp. 94, 95.

"The first necessity for a mortality table presents itself in connection with this plan in computing the rate which the Government must charge its employees for annuities due them on reaching the age of retirement. The British Offices' Select Annuitants' Mortality Table is recommended for that purpose.

"In constructing Part I of the proposed plan it was necessary to select a mortality table for computing the rates which the Government should charge its employees for annuities purchased with their savings. Since, under the bill, the employees are to be given the right to take their savings on retirement either in a cash sum or in the form of an annuity, *it was very important to choose a table with a mortality sufficiently low* to overcome this selection against the Government. Manifestly, retiring employees would choose between the cash and annuity according to their condition of health. An employee in poor health would in all cases prefer a cash sum, whereas one in the enjoyment of excellent health would be likely to choose the annuity." Report, p. 95.

"The next need for a mortality table is in computing the cost of annuities for services rendered prior to the adoption of the plan. The American Experience Table of Mortality, an insurance table, was used in the first step of the calculation. * * * *This table was selected because* it has been found that in the ages up to about 70 the graduation is more nearly in harmony with the experience of the American insurance companies, and because *under it the probability of living between the various ages and the ages of retirement is considerably higher* than under any of the other recognized insurance tables." Report, p. 98.

"From about the age of 75 *the American table shows a severe rate of mortality,* and *it was thought best, therefore,* in discounting the annuities from the retirement age down to the death of the last survivor by the probability of living each year, *to make use of a table which shows generally a greater expectation of life* after the retirement ages than does the American table. The Combined or Actuaries' Table, therefore, which shows at the age of 80 about six months' greater expectation of life than does the American table (4.78 years as against 4.39) and *at older ages still greater differences of expectation,* was selected for this purpose. It shows the death of the last person at the age of 99 as against the age of 95 in the American table, and probably more nearly represents the true span of life than does the American table." Report, p. 99.

"The effort has been throughout to use such tables as would give the highest rate for annuities, so that the estimate of cost under Part II of the plan would be a minimum." Report, p. 99.

Both Hoffman and the author of the report just quoted refer, of course, to mortuary tables based upon the experience of life insurance companies and, in consequence, often referred to as "experience tables. These tables are, however, based upon the selected class of individuals whose lives are "insurable risks," a class from which rigid medical examinations have eliminated all persons of dissipated habits, defective health, or whose occupations are especially dangerous or unhealthful. Surely, such tables, if mortuary tables were contemplated at all, could not have been within the intendment of Congress. But *there are no other tables that even pretend to be based upon data of scientific breadth and accuracy.* The article on "Insurance, Life," in the eleventh edition of the Encyclopædia Britannica, written jointly by Dr. C. T. Lewis, sometime lecturer on life insurance at Harvard, Columbia and Cornell universities, and Dr. T. A. Ingram, director of the British School of Archæology at Rome, contains the following:

"Elaborate efforts have been made by several governments to employ the machinery of census bureaus for determining the general rate of mortality, and it has been the worthy ambition of able actuaries to devise trustworthy methods of utilizing the census returns for this purpose. * * * But all such general tables are as yet but tentative and provisional. The imperfections of mortuary registries and of census returns are great, and corrections are largely conjectural. Until more complete methods of collecting the facts are practiced, *the experience of life insurance companies promises to furnish the only mortality tables having claim to authority.*" Vol. XIV, p. 667.

While mortuary tables have frequently been admitted as evidence, there is no case in which they have been regarded as conclusive, and their essential limitations have always been recognized as well as the necessity of supplementing them by testimony showing the degree in which they should probably be corrected to meet the conditions of the particular life to which they were to be applied. Thus, in the case of Vicksburg and Meridian Railroad *v.* Putnam (118 U. S., 545), cited in Lynch *vs.* Union Trust Company, *supra,* this court, speaking through Mr. Justice Gray, concerning the manner in which damages for personal injuries sustained by a passenger forty-nine years of age should be ascertained, said, in part:

"In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. The D. S. Gregory, 2 Ben., 226, 239, affirmed in 9 Wall., 513 (76 U. S., 19 L. Ed., 787); Rowley *vs.* London & N. W. R. Co., L. R., 8 Exch., 221; Sauter *vs.* N. Y. Cent. R. R., 66 N. Y., 50; McDonald *vs.* Chic. & N. R. R., 26 Iowa, 124, 140; Cent. R. R. *vs.* Richards, 62 Ga., 306.

"But it has never been held that the rules to be derived from such tables or computations must be

> the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much considered case of Phillips *vs.* London & Southwestern Railway, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable, and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. * * *
>
> "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of this plaintiff's life, * * *"

In Grove *vs.* Youell, decided by the Supreme Court of the State of Michigan, the question was as to fixing damages for eviction from a room which the plaintiff had the right to occupy during the remainder of her life, and the court approved a charge to the jury in which the trial judge had said, in part:

> "To determine the plaintiff's damages, if any, subsequent to the commencement of this suit, you will find from all the evidence in this case, considering the plaintiff's age, her health, her condition in life, her expectation of life, as shown by the table of mortality based on American experience, and the circumstances under which she is placed, how long she will probably live, * * *" (33 L. R. A., 297-298).

The question of the propriety of the quoted portion of the charge was especially raised by the appeal. Similarly in Unger *vs.* Leiter, 32 Ohio St., 210 (quoted with approval in Mandel *vs.* McClave, decided by the Ohio Supreme Court and reported at pages 519-523 of 5 L. R. A.), the court found that the value of a contingent right of a wife to dower

was ascertainable, by reference to tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband. In Hunn *vs.* Michigan Central Railroad the Supreme Court of the State of Michigan reviewed a judgment granting damages for the death of Hunn and considered the objection of the railroad to the introduction of mortuary tables in evidence, holding that such tables could be introduced, but subject to qualification. The court said, in part:

> "The mortuary tables contained in Howell's Statutes were properly admitted in evidence, as some testimony tending to show Hunn's expectancy of life at the age of twenty-seven. Balch *vs.* Grand Rapids & I. R. Co., 67 Mich., 394; 11 West. Rep., 476.
>
> "Such tables are not conclusive. They show the probable age which a healthy person may expect to reach, whose age is given. But when that is before the jury, and the physical condition of the person at the time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from the testimony before them the probable duration of the decedent's life had he not died as a result of his injury." (7 L. R. A., 507.)

The decision of the Kentucky Court of Appeals in Illinois Central Railroad *vs.* Houchins, rendered on November 28, 1905 (1 L. R. A., new series, 375), contains interesting discussion of the variation of different mortuary tables and the character of the selected classes to which alone they can be understood to apply, which is, in part, as follows:

> "According to Dr. Wigglesworth's table, which has been adopted by this court, the expectancy of life of a man at twenty-nine years old is thirty and sixty-six hundredths years. The evidence objected to showed that the expectancy of life at twenty-nine years was nearly six years longer. When the action is to recover for the death of a person injured, as the measure of recovery is the value of his capacity to earn money, standard tables, showing the ordinary

expectancy of life, are held to be competent. Where as in this case, there is proof tending to show that the plaintiff's capacity to earn money is impaired or partially destroyed, the probable expectancy of life is equally competent; for the measure of recovery here is in part compensation for the impairment of his capacity to earn money. If, as is conceded, evidence of the ordinary expectation of life may be received where the capacity to earn money is destroyed by death, it is hard to see why such evidence cannot be equally received where the capacity to earn money is partially destroyed; for in either case the jury are, in making up their verdict, to be governed by the capacity to earn money which has been destroyed, and whether this is a partial or total destruction is not material. Greer *vs.* Louisville & N. R. Co., 94 K., 169; 42 Am. St. Rep., 345; 21 S. W. 649.

"The Carlisle mortality tables are based upon actual observation in the towns of Northampton and Carlisle, England. The deaths were taken, not from selected lives, but from the population generally. These tables have been very generally admitted by the courts of this country. Lincoln *vs.* Power, 151 U. S., 436; 38 L. Ed., 224; 14 Sup. Ct. Rep., 387; 17 Am. & Eng. Enc. Law, p. 900. The field, however was so narrow that they have never been regarded as satisfactory. It is a matter of common knowledge that the expectancy of life is increasing. The American table of mortality has been made out from the combined experience of the life insurance companies of America, and is now regarded as the standard throughout the United States. It is true that it is based on insurable lives or healthy persons. Still there is no great difference between it and the Carlisle table, as by the Carlisle table the expectancy of life of a person twenty-nine years old is thirty-five years. In cases of this character the aim of the court is to get the best information attainable. The American tables of mortality have been recognized by many of the courts of the country as perhaps the best means of arriving at the expectancy of life. The Wigglesworth tables were made before 1858. Since

then there has been great advance in medical science, and the *data* upon which such tables are calculated are much fuller now than then. The court, as information increases, will use that table which is the best and most reliable. The American mortality table was held competent in the case of Greer *vs.* Louisville & N. R. Co. *supra,* and this case was followed in Louisville & N. R. Co. *vs.* Gordon, 24 Ky. L. Rep., 1819; 72 S. W., 311. After maturely reconsidering the subject, we have reached the conclusion to follow the rule heretofore laid down, and to hold that in each case the expectancy of life may be shown, as any other fact, by the best evidence obtainable, and that, as improved tables come into use which are of standard authority, they may be given in evidence, instead of the older tables which they supersede.

"Such tables show only the probable continuance of life, and not the duration of ability to earn money. They show the probable duration of life of healthy persons who are insurable risks; and the court, when requested, should tell the jury what the table shows, and that it is to be considered by them, in connection with the other proof in the case, for what it may be worth, considering the plaintiff's state of health and circumstances, in determining the probable duration of his capacity to earn money. 3 Wigram, Ev., Section 1698; Gordon *vs.* Tweedy, 74 Ala., 232; 49 Am. Rep., 813."

The table of expectancy of life used in this case, under direction from the Treasury Department, is to be found on the back of the form for legacy returns (Form No. 419, approved December, 1901), and is printed in the Record (pp. 16-17). This table and instructions to the collectors of internal revenue to use it are embodied in the circular issued over the signature of the Commissioner of Internal Revenue on December 16, 1898 (Series 7, No. 3, Revised Supplement No. 1), published at page 195 in the "Compilation of Decisions rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898," issued

from the Government Printing Office, at Washington, in 1899. The average "expectancies" given therein, under the heading "Mean redemption period," vary considerably from those in other tables. Thus, in the foregoing quotation, it appears that Dr. Wigglesworth's table gives the expectancy of life of a person twenty-nine years of age (the age of Mary Wadleigh Stokes at the time of the death of her testator) as 36.66 years, while the Treasury table shows an expectancy of 30.205 years. At the same age, the Carlisle tables show an expectancy of 35 years, while the expectancy for the same individual shown by the American tables of mortality is 36.2 years.

The application of a single table of expectancy of life to all cases arising under the act of June 13, 1898, ignored the fact that expectancy of life varies as to different races, sexes, places of residence, habits, occupations, and in consequence of other factors.

> "The factors, in addition to locality, which influence the mortality, such as age, sex, color, nativity and parent nativity, conjugal condition, occupation, and season, are so numerous that to give tables showing all of them in their complex relations to causes of death in each area, in a general report of this kind, is entirely impracticable." Special Reports of the Census Office, Supplementary Analysis Twelfth Census; a Discussion of the Vital Statistics of the Twelfth Census, by Dr. John Shaw Billings, page 493.

In the report from which the foregoing is quoted, Dr. Billings also said:

> "We know that the death rate of the country, taken as a whole, is low, and that there are differences in the death rates of different States, amounting to four to five per thousand for the whites, but these facts do not answer most of the questions which are of the greatest interest in sociology, in political science, in practical hygiene, and in life insurance.

> "The ideal answer to these questions would be an extensive series of life tables which would show for each sex of each race the expectation of life at each age, for each city of, say, 10,000 inhabitants and upward, and for each of a certain number of occupations, with corresponding tables for each group, showing the principal causes of death." *Ibid.*, p. 508.

The report then proceeds to give tables showing, according to their caption, expectation of life in certain cities and States. These tables are, it is stated, applicable to persons of the white race only. It is suggestive to consider the variation which the tables referred to show as to persons of the same age, in accordance with sex and the place of residence. The following figures are from these tables:

Expectation of Life for White Persons Thirty Years of Age.

Place of residence.	Probable future duration of life in years.	
	Males.	Females.
Baltimore, Maryland	31.30	34.20
Boston, Massachusetts	31.65	33.09
Brooklyn, New York	31.23	33.19
Massachusetts	34.66	36.07
District of Columbia	31.66	34.70
New Jersey	33.84	35.79

Assuming the substantial accuracy of the foregoing official figures, based, as they are, upon the widest investigation and the most profound scientific knowledge, it is evident that a valuation of a "life interest" of a male resident of Brooklyn and of a female resident of Massachusetts, both being thirty years of age, the former having, assuming the tables to be otherwise applicable, a real expectation of 31.23 years and the latter a real expectation of 36.07 years, by means of an arbitrary rule placing the expectation of both at the same number of years, leaving all other matters out of the ac-

count, must, inevitably, either overvalue the one or undervalue the other. The apparent necessity of resorting to such a rule is the plainest possible proof that Congress did not intend to tax interests that could be reached only by such a method. Yet this court is asked to hold that it was the purpose of Congress to tax such interests and to make necessary this arbitrary method of assessment, although in the whole statute there is not a paragraph, a sentence, a line, or a word that refers to such tables.

Here, again, the court will be aided, as is respectfully submitted, by reference to the rule that where the words and phrases necessary to accomplish a particular purpose were well known and had frequently been used they would be used were that purpose intended. The necessary language could have been found in many State statutes that were intended to be applied to future payments. The New York "transfer tax act," which, as has already been noted herein, in terms makes the legacy and succession tax applicable to "any property *or the income thereof*" passing by will or under the intestate laws, says:

> "The value of every future, or contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies; except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum." Laws of 1892, chap. 399.

Attention is asked to the concluding sentence fixing the rate of interest to be used in the calculations provided for. It will hereinafter be noted that the Commissioner of Internal Revenue was forced, in order to carry out his theory of the act of June 13, 1898, to apply an arbitrarily assumed

rate of interest, not named in that statute or any of its amendments, and this rate of interest controlled the amount of the alleged tax demanded as absolutely as did the rate of taxation fixed by Congress. The same New York law also provided:

> "The superintendent of insurance shall, on the application of any surrogate, determine the value of any such future or contingent estates, income or interest limited, contingent, dependent or determinable upon the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct." Laws of 1892, chap. 399, as amended by Laws of 1895, chap. 556.

The statute of Massachusetts reads:

> "In case of an annuity or life estate the value thereof shall be determined by the so-called actuaries' combined experience tables and four per cent compound interest." Laws of 1891, chap. 425.

The Massachusetts provision, as just quoted, is embodied in the Maine law (Laws of 1893, chap. 146, as amended by Laws of 1895, chap. 96), except that the rate of interest in Maine is made five per cent instead of four per cent. What has been said about Maine applies also to Ohio (Laws of 1894, p. 166) and Connecticut (Laws of 1889, ch. CLXXX).

Section 11 of the collateral inheritance law of California (Laws of 1893, ch. CLXVIII, as amended by Laws of 1895, section 11), is, by its initial sentence, made applicable—

> "When the value of any inheritance, devise, bequest or other interest subject to the payment of said tax is uncertain, * * *"

and, it is particularly noteworthy that, under this classification it provides—

"and the value of every future, or contingent, or limited estate, income, or interest shall, for the purposes of this act, be determined by the rule, method, and standards of mortality and of value that are set forth in the actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum; and the insurance commissioner shall, on the application of said court, determine the value of such future, or contingent, or limited estate, income, or interest, upon the facts contained in such report, and certify the same to the court, and his certificate shall be conclusive evidence that the method of computations adopted therein is correct."

The mortuary tables prepared, promulgated and used by the Government in connection with the act of June 13, 1898, were general in their application, mathematically rigid and unyielding in their character. Whether the spark of life in the breast of any "life tenant" flamed with the splendid force of unique vitality in one case, or flickered feebly toward exhaustion in another, if the ages were the same the same "expectancy of life" was found in the tables and was used in the assessment. The invalid in the last stages of incurable disease and the man in the perfect flower of robust health, the alcoholic degenerate and one who controlled to moderation all his appetites, one whose reckless daring led daily into dangerous adventure and one who timorously avoided every insignificant risk, are all classed together and with identical ages were assigned identical expectations. The fallability of these tables and the certainty of erroneous results from their use are illustrated in Kahn *vs.* Herold (Circuit Court, District of New Jersey), in which it appeared that *a life interest that according to the tables should continue for some thirty years actually terminated before the tax assessed by the use of such tables had been assessed or collected.*

> "Life tables at the best are uncertain and conjectural evidence. They are used because in many cases they afford the best if not the only means of ascertaining the probable duration of a life or lives. * * * they were here used under circumstances which would have barred their use, even if the act had expressly permitted it. The event which through their use it was calculated would happen some thirty years or more in the future had already transpired. The life estate assessed was ended. Its duration was ascertained." Kahn *vs.* Herold, 147 Fed., 575, 582, 583; affirmed, 159 Fed., 608.

In Herold *vs.* Shanley, *supra*, the decision of this court in Dunbar *vs.* Dunbar (190 U. S., 340; 47 L. Ed., 1084) was cited as authority for the proposition that the right to receive income during life or until remarriage is not one that is capable of being accurately valued. It is believed that the judgment in that case would have been the same *had the contingency of remarriage been omitted* and that that conclusion is especially supported by the first of the following paragraphs from the opinion:

> "In many cases where actions are brought for the violation of contracts, such as Pierce *vs.* Tennessee Coal, I. & R. Co., 173 U. S. 1, 43 L. ed., 591, 19 Sup. Ct. Rep., 335; Roehm *vs.* Horst, 178 U. S. 1, 44 L. ed., 953, 20 Sup. Ct. Rep., 780, and Schell *vs.* Plumb, 55 N. Y., 592, it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality, and to other means of ascertaining as near as possible what the present damages are for a failure to perform in the future; but we think the rules in those cases are not applicable to cases like this, under the bankruptcy act.
>
> "Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other

contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it.

"It is true that this has been done in England under the English bankruptcy act of 1869 (32 and 33 Vict., chap. 71, Sec. 31). In *ex parte* Blakemore (1877) L. R., 5 Ch. Div., 372, it was held by the court of appeal that the value of the contingency of a widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the 31st section of the bankruptcy act of 1869. James, Lord Justice, said:

"'No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of any particular life is uncertain, the expectation of life at a given age is reduced to a certainty when we have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience.'

"Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no 'practical experience' as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience tables in regard to millions of lives, and, under such circumstances, there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency." 190 U. S., 340, 345-347.

The question is not now whether approximations can be attained or estimates may be made, but whether "actual" and "clear" value can be ascertained, a very different thing. The learned judge who delivered the opinion in *In re* Hoffman (143 N. Y., 327, 38 N. E., 311) was right when he said, in the extract quoted by Mr. Justice White when delivering the opinion in Vanderbilt's case:

> "I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the average of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce." Quoted, 196 U. S., 496.

It is true that, where not forbidden by a spendthrift clause or any other provision in the will creating the trust and not prohibited by local law, such interests as that taken by Mary Wadleigh Stokes can be sold or realized upon. But how and at what cost? Only by insuring against every possible contingency which might prevent the payment of the income, including the death of the beneficiary before the expiration of the expectancy of life, and then only at an excessive discount. That is, such disposal would be at usurious rates of interest; and, then, only by transferring the risks and eliminating, as to the purchaser, the contingencies by means of wagering contracts—insurance contracts, exempt from the general condemnation with which the law visits such contracts, but none the less wagering contracts. This slender and costly possibility is not sufficient to sustain a tax laid only upon "actual" and "clear" values.

SEVENTEENTH. CONGRESS, NOT HAVING ADOPTED A RATE OF INTEREST FOR THE CALCULATION OF THE ANNUAL RETURN ON TRUST FUNDS OR OF THE "PRESENT WORTH" OF FUTURE PAYMENTS, AND HAVING MADE NO PROVISION FOR THE DETERMINATION OF SUCH A RATE, IT CANNOT HAVE INTENDED THAT RIGHTS TO RECEIVE SUCH INCOME PAYMENTS, INDEFINITE IN AMOUNT, SHOULD BE TAXED AS SUCH OR BEFORE THE TIME WHEN EACH FUTURE PAYMENT SHOULD BECOME DUE TO THE BENEFICIARY.

Just as all necessity for the use of mortuary tables, under the legacy tax act of June 13, 1898, would cease with the

affirmance of the decision below in this case, so also such affirmance would put an end to dependence upon or need for an arbitrarily assumed rate of interest.

The trust fund, the income on which (less an annuity of $500.00 per annum) was to be paid to Mary Wadleigh Stokes during her life, amounted to $120,303.94 (Record, p. 31). As the Government arbitrarily assumed that this fund would earn four per cent per annum, it determined that her income would be $4,312.15 yearly during continuance of the trust. If the rate assumed had been two per cent, the estimated income would have been $1,906.08; if three per cent, it would have been $3,109.12; if five per cent, $5,515.20; if six per cent, $6,718.24; if seven per cent, $7,921.28; if eight per cent, $9,124.32. The present worth of one dollar, payable at the end of each year for thirty years, also varies with the rate of interest, and, in addition, is worth more if interest is compounded infrequently (say annually) than if it is compounded frequently (say every three months). With interest compounded annually at two per cent, an annuity of one dollar payable at the end of each year for thirty years has a "present worth," at the beginning of the period of 22.39\frac{646}{1000}$; at three per cent the "present worth" is 19.60\frac{44}{1000}$; at five per cent, 15.37\frac{245}{1000}$; at six per cent, 13.76\frac{483}{1000}$; at seven per cent, 12.40\frac{904}{1000}$, and at eight per cent, 11.25\frac{778}{1000}$ ("Robinsonian Complex Interest Simplified;" by J. Watts Robinson, Boston, published by the author, 1889).

Using the foregoing data the following table has been calculated, showing how the amount of the pretended tax in this case would have varied if the Commissioner of Internal Revenue had calculated it as a thirty-year annuity, using any rate other than the four per cent rate which he arbitrarily decided upon.

If the Commissioner had used—	Estimated income would have been—	Present worth of one dollar payable at end of each year for thirty years.	Assessed value.[1]	Amount of tax at $7.50 per $100.00.
2 per cent.....	$1,906.08	$22.39646	$43,189.44	$3,239.21
3 per cent.....	3,109.12	19.60044	61,440.12	4,608.01
5 per cent.....	5,515.20	15.37245	85,282.14	6,396.16
6 per cent.....	6,718.24	13.76483	92,975.43	6,973.16
7 per cent.....	7,921.28	12.40904	98,795.48	7,409.66
8 per cent.....	9,124.32	11.25778	103,219.59	7,741.47

[1] Product of second and third columns plus $500.00, the value of the specific legacy to Mary Wadleigh Stokes.

The Commissioner of Internal Revenue chose to select four per cent as the rate to use in calculating these estimates of the value of future payments, and so the amount of the pretended tax claimed from this estate was $5,600.90. If he had the right under the law to choose four per cent he had equally the right to choose two per cent or eight per cent or any rate per cent between those limits. Actually there was no semblance of authority in the statute for the effort to reduce the uncertain annual income devised to Mary Wadleigh Stokes to a certain income which it was assumed would be uniform in amount throughout many future years. We quote, briefly, from the decision of the Circuit Court of Appeals for the Second Circuit in a case under the act of June 13, 1898, decided on October 11, 1905.

> "In *Booth vs. Ammerman,* 4 Bradf. Sur., 129, cited *In re Dewey,* 153 N. Y., 63; 46 N. E., 1039, and approved in *Welsh vs. Brown,* 43 N. J. Law, 37, a bequest was of the interest upon a certain sum, payable annually. The court said, referring to the bequest, as follows:
>
> > " 'It is not a stated sum, but may be more or less, according to the earnings of the capital. In this respect it does not possess the characteristics of an annuity, but is merely interest

> or income * * *. The thing given is the profits of a certain portion of the estate, to be separated in money and invested.'
>
> "A life estate or legacy for life is the income or interest of a certain fund consisting of profits to be earned, which income is uncertain in amount. It is not a fixed sum, nor to be made a sum certain. Pearson *vs.* Chace, 10 R. I., 455; Whitson *vs.* Whitson, 53 N. Y., 479." Peck *vs.* Kinney, 143 Fed., 76, 80.

But it was only by the arbitrary assumption that the trust fund would produce exactly four per cent per annum that the corpus by which the alleged tax was measured and created. Some rate had to be assumed to create that corpus. The legacy-tax provisions of the act of June 13, 1898, said nothing about any rate per cent to be applied for this or any other purpose and yet, if such future payments were taxable at all, the use of some rate was absolutely necessary. Therefore, if they were taxable, the determination of the rate was absolutely within the administrative discretion of the Commissioner. If he had chosen to use two per cent he could have defended its use on the ground that the Federal Government was able to borrow money at that rate, if he had preferred eight per cent he could have argued that many States permit that rate on contract obligations and that in Alabama it is the rate on all judgments. But the rate of interest adopted for this purpose actually controlled, as has been seen, the amount of the tax. That Congress should have intended to give such power to an executive officer is unthinkable; that an effective grant of such power could be implied is not within the limits of even the most liberal rules of statutory construction. If the grant could be made at all, which is more than doubtful, the most explicit terms would be necessary.

Insurance actuaries hold that, for the purpose of dealing with a large number of insurable lives, the risks of death being averaged and set off one against another so that, as to the whole number, chance is eliminated or brought within

a moderate margin of error which can be made to run in favor of the insurer, the really insurmountable obstacle to scientific accuracy lies in the impossibility of accurately forecasting the rate of interest. While this inherent difficulty is not so much enhanced, as is the uncertainty as to the death rate, when the calculation is applied to a single life instead of a large number of lives, it exists to its fullest extent and cannot now be ignored. The article on "Insurance, Life" in the Encyclopædia Britannica (eleventh edition) already quoted from contains the following:

> "The actuary is forced to observe that the interest factor in his calculations is much less definitely fixed by known facts than the mortality factor. The longer a contract has to run, the greater the effect of the difference in rate. The value of a payment to be made in thirty years is greater by above one-half with interest taken at three per cent than at four and one-half per cent, and one to be made in thirty-six years is more than twice as great. * * * The tendency of opinion is to hold that a progressive lowering of interest rates must result from the accumulation of wealth. In support of this belief it is pointed out that from 1872 nearly to the present time there has been a general and somewhat uniform decline in the yield of invested capital, as represented by government stocks, mortgage loans, savings-bank deposits and discounts in all commercial nations. The movement has been disguised by wide fluctuations, temporary or local, but has been on the whole world-wide and continuous, when great masses of capital, such as the investments of life companies, are kept in view * * * There are not wanting, however, indications that the protracted decline in rates of interest in the world's markets may have been checked, and even that a reverse movement has begun. * * * On the whole, it seems clear that the accumulation of wealth in itself has no necessary tendency to diminish the productiveness of capital; that this productiveness, on the general average, has not materially varied in many generations; but that the promise and expectation of productiveness which prompt the demand

> for its use depend upon the activity of enterprise, growing out of the prevailing spirit of hope; upon the rapidity with which new inventions are made, industries extended, and floating or loanable capital expended in permanent works." Vol. XIV, pp. 668-669.

These are interesting speculations, but they are speculations merely and that they necessarily belong in that category is the important fact now to be considered. This fact points out unerringly that in assuming that Congress intended to reach such interests as that presented by this case, the Commissioner of Internal Revenue forced himself into a position where reliance upon the results of pure speculation could not be avoided. Taxation may not rest upon such a foundation. The passage from Nicol *vs.* Ames (173 U. S., 509; 43 L. ed., 786; 19 Sup. Ct., 522), quoted and reaffirmed by this court in Knowlton *vs.* Moore, *supra*, is exactly in point, and is given below:

> "Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." Quoted, 178 U. S., 41, 83.

EIGHTEENTH. CONGRESS CAN NEITHER DELEGATE POWER TO FIX A RATE OF TAXATION, NOR POWER SUBSTANTIALLY EQUIVALENT THERETO, AND HENCE, IF CONGRESS HAD INTENDED TO ENTRUST TO THE COMMISSIONER OF INTERNAL REVENUE THE POWER TO FIX A RATE OF INTEREST TO BE USED IN ASSESSING FUTURE INTERESTS, THE ATTEMPTED DELEGATION WOULD BE VOID.

That no authority except the legislative authority can fix a rate of taxation is elementary.

> "The power to tax belongs exclusively to the legislative branch of the government." Spencer *vs.* Merchant, 125 U. S., 345.
>
> "The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect." Cooley on Taxation, Third edition, pp. 99-100.

Undoubtedly Congress is permitted to delegate to others the determination of matters which it might rightfully determine for itself, but it cannot assign to any other agency a scintilla of power that is strictly and exclusively legislative. (The Aurora *vs.* United States, 7 Cranch, 382; 3 L. ed., 378; Wayman *vs.* Southard, 10 Wheat, 1, 41; Field *vs.* Clark, 143 U. S., 649; 36 L. ed., 294; Buttfield *vs.* Stranahan, 192 U. S., 470; 48 L. ed., 525; Union Bridge Company *vs.* United States, 204 U. S., 364; 51 L. ed., 523; St. Louis, Iron Mountain & Southern *vs.* Taylor, 210 U. S., 281, 387; 52 L. ed., 1061, 1064; United States *vs.* Grimaud, 220 U. S., 506; 55 L. ed., ——.) Whatever powers of delegation Congress may possess, it is certain that the line between those powers which it must exercise itself and those that it may entrust to others is drawn on the hither side of the power to prescribe a system of taxation or to fix the rules which effectually control the amount that the citizen shall be compelled to contribute to the support of his government.

But if the Commissioner of Internal Revenue was given, by the act of June 13, 1898, the power to prescribe a rate of interest to be used in calculating the present worth of legacies to be paid in the future, and the tax-rate fixed by Congress was to be applied to the "present worth" so calculated, he had power to determine how much should be collected in respect to such interests as effectually as though he had been given power to fix the tax-rate itself; such power was the precise equivalent of power to prescribe a rate of taxation.

That such is the case has been fully shown under the preceding subhead (*supra*, pp. 96 to 101). If the Commissioner had such power to fix a rate of interest, he undoubtedly would have power to change it from time to time; nor could it be expected that in exercising it his judgment would not be affected by the fiscal needs of the Government. Thus it would come to pass that the Executive Department would be freed from reliance for revenue upon the Legislative Department—would be able to assume pecuniary obligations and to provide itself at will with funds with which they could be met. Such a situation, under a republican form of government, is unthinkable and impossible.

Attention has already been directed to the fact that in New York, Massachusetts, and many other States where future interests were made presently taxable, the rate of interest for estimating their "present worths" was prescribed in the taxing statutes (*supra*, pp. 91-92). And in establishing a Federal tax upon successions to real estate, in 1864 (13 Stat., 223, 287-291), which by its terms was made applicable to rights in "expectancy" and rights to receive "income," Congress did not fail to prescribe the manner in which the rate of interest to be used in calculating the "present worth" for the purpose of assessing the tax on future interests should be determined. Section 144 (13 Stat., 290) provided for the commutation of the tax on expectancies for a sum to be "presently paid" as follows:

> "and for assessing the amount that shall be so payable he shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and *the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the Commissioner in respect of duties paid in advance,* * * *" 13 Stat., 290.

The inclusion, in the succession tax law of 1864, of the foregoing, and of section 141, which directed the refund when the happening of a contingency caused an estate to determine be-

fore the assumed period of determination used for the purposes of the assessment, and section 137, permitting payment to be deferred until possession occurred, and *the omission of all such provisions or their equivalents in the legacy tax law of 1864,* which was a part of the same statute, as well as the use of the word "income" in the former and its absence from the latter, are extremely persuasive that the legacy tax of 1864 was not intended to apply to income payments such as those now in issue.

But even though it could be thought that Congress intended to confer the power arbitrarily to fix the rate of interest to be used for assessing such interests it had no authority to do so. Therefore, if the statute permits any interpretation or construction which will avoid that conclusion such interpretation or construction is the one that will be adopted. This court, in construing a taxing law, will seek, if necessary, for that meaning which does not subject the taxing law to so grave a constitutional objection.

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." United States *ex rel.* Attorney-General *vs.* Delaware & Hudson Company, 213 U. S., 366, 407.

And not only will this court choose that interpretation of a statute which brings it within the constitutional power of Congress, but of alternative interpretations, one of which raises a grave constitutional question, while the other avoids that question, it is the duty of the court to adopt that interpretation by which the doubt as to constitutionality is eliminated.

> "* * * Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of

which such questions are avoided, our duty is to adopt the latter." *Ibid.*, 213 U. S., 366, 408.

And in another case:

> "If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits." Harriman *vs.* Interstate Commerce Commission, 211 U. S., 407.

There is no possible interpretation of the act of June 13, 1898, or its amendments that would bring Mary Wadleigh Stokes' income payable (say) in the year 1914 within the scope of that statute prior to its repeal on July 1, 1902, that does not require the determination of a rate of interest for calculating its "present worth" prior to the latter date. And as no power to determine that rate, except the power of Congress, existed or could have existed, and as Congress did not determine the rate, the tax was not applicable.

> "Executive officers may be authorized to prepare blanks and forms, or prescribe in certain respects the manner of executing the legislative will, but they may not receive a delegation of the legislative power, even if such a delegation were intended to be made. We think, therefore, there was no tax imposed by the act of 1898 on the interest of Rachael Asch, other than the specific payments of the annuity bequeathed to her as the same should from time to time fall due." Disston *vs.* McClain, 147 Fed., 114, 123.

NINETEENTH. THE AMENDMENT OF 1901 (31 STAT., 948), REQUIRED THE TAX TO BE "DEDUCTED FROM THE PARTICULAR LEGACY OR DISTRIBUTIVE SHARE ON ACCOUNT OF WHICH THE SAME IS CHARGED." THIS WOULD FREQUENTLY BE IMPOSSIBLE UNDER THE CONSTRUCTION NOW CONTENDED FOR BY THE GOVERNMENT, AND INABILITY SO TO DEDUCT IT WOULD IN MANY CASES THROW THE BURDEN OF THE TAX UPON AN EXEMPT INTEREST.

By the act of March 2, 1901 (31 Stat., 948), section 30 of the act of June 13, 1898, was amended by adding at its close the following:

> "Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Doubtless if this provision had never been added such deduction from a particular legacy would have been held to be necessary, for in Vanderbilt *vs.* Eidman, *supra,* referring to provisions of section 30, this court said:

> "These provisions harmonize with the meaning which we have ascribed to section 29, since they clearly import that the tax is to be deducted from a beneficial interest which the beneficiary was entitled to enjoy, and from which, *before payment or distribution,* a deduction of the duty was to be made." 196 U. S., 480, 494.

Section 29, as originally adopted and as it remained until the repeal, contained the following proviso, making an exception in favor of legacies to husbands and wives:

> "*Provided,* That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty."

The amendment of March 2, 1901 (31 Stat., 946), to section 29 provided:

> "That nothing in this section shall be construed to apply to bequests or legacies for uses of a religious, literary, charitable, or educational character, or for the encouragement of art, or to legacies or bequests to societies for the prevention of cruelty to children, including all bequests or legacies of such character on which the tax imposed had not been paid or collected on the first day of March, 1901."

The act of June 27, 1902 (32 Stat., 406), under the third section of which the present suit was brought, by its first section directed the refund of all taxes on legacies for charitable, educational, and religious uses, such as those contemplated in the foregoing proviso, collected prior to its enactment or in violation of its terms. Even without either of these amendments the remainder, which was to pass to the charities named in Tilden's will (Record, pp. 28-29) on the determination of the rights of Mary Wadleigh Stokes, would not have been taxable as a remainder (Vanderbilt *vs.* Eidman, 196 U. S., 480) or at any time prior to her death. In virtue of these amendments this remainder, even though she had died at any time while the act of June 13, 1898, was in force, would have been in reality exempt from taxation—that is to say, if she had died after March 1, 1901, it would have been exempt; if she had died prior to that date the amount collected would have been refunded.

That a construction of a taxing statute must be so practical as to be workable under all circumstances that may possibly arise is so obvious a proposition that it needs no elaboration or argument. A proposed construction of a statute that cannot be applied to all possible facts cannot be sustained, for a valid proposition of construction must withstand the same test as a proposition in Euclidian geometry, namely, that of universal application. If a state of facts might have arisen, and *a fortiori* if such a state of facts was easily within the probabilities as measured by ordinary human experience, under which the pretended tax claimed and collected on account of the rights of Mary Wadleigh Stokes could not have been deducted from what she actually received, it follows as surely as night follows day that too much was claimed and collected; in other words, that the Government's theory of construction must fall. Let this acid test be applied.

Walter H. Tilden died on March 16, 1899 (Record, p. 29); on August 16, 1900, the appellee, as his executor, paid

to the Collector of Internal Revenue in Philadelphia the sum of $5,600.90, which sum was assessed against the rights of Mary Wadleigh Stokes and no part of it in respect to any other interest in Tilden's estate (Record, pp. 30-31). The Government asserts, as a fact, which it makes an essential part of its case, that Mary Wadleigh Stokes' income from the trust fund was $4,312.15 per annum. Therefore, if she had died on the first anniversary of her testator's death, the situation as to her receipts under the will and the tax demanded in respect to the rights thereunder would have been as follows:

Tax demanded		$5,600.90
Income of trust fund	$4,312.15	
Specific legacy	500.00	
		4,812.15
Excess of tax over ascertained value of legacies		$788.75

The excess of the tax over the amount received under the will would have been greater had the beneficiary died earlier than one year after the testator's death. When it collected the alleged tax, on August 16, 1900, the Government was not able to give to this taxpayer a receipt guaranteeing that she would live out her full "expectancy of life" or even a second beyond the moment of payment. Yet at her death every right she had in the trust fund would cease and determine; the whole actual value of her legacies, theretofore, indefinite and uncertain, would be ascertained. The burden upon Government's counsel in this case, therefore, is to show how a tax of $5,600.90 could be deducted from a legacy worth $4,812.15 (as above), or possibly from a much smaller sum. In Knowlton *vs.* Moore, *supra*, this court found convincing support for the conclusion it then reached in the provision of the legacy tax law of 1864 that the tax should be deducted from the particular legacy or distributive share, saying as to that provision:

> "In other words, the act expressly commanded that to be done which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential." 178 U. S., 41, 69; 44 L. Ed., 969, 981.

The provision as to deduction from a particular legacy, incorporated in the act of June 13, 1898, by the amendment made after the decision in Knowlton *vs.* Moore, *supra,* is in the precise terms of the provision referred to in the foregoing extract. It is plain, therefore, that it might truthfully be said of the act of June 13, 1898, as thus amended, that—

> "The act expressly commanded that to be done which it was impossible should be done compatibly with any hypothesis that the tax was on * * *,"

"present worths" of rights to receive income in the future, which rights were determinable upon the happening of a contingency that might happen at any moment. In other words the act required that to be done which is absolutely incompatible with the interpretation asked for in this case by the Government. Being irreconcilable with the Government's theory, and also being an explicit requirement of the statute, it destroys the former.

It is true that in this particular instance the tax was not collected until one year and five months after the decease and that at that time, if in the meantime and up to the precise date of payment the trust fund had earned fully four per cent per annum, the beneficiary had become entitled to a trifle more than the amount of the alleged tax. However this may be, if the tax was deducted from her legacy, she must have gone substantially without income from her testator's death to the date of payment, something neither her testator nor the statute could have contemplated. Let the case be supposed of rights given by will to a person of the same age as Mary Wadleigh Stokes to receive during life in quarterly installments the income of a trust fund of

$1,500,000.00, the immediate beneficiary being a stranger in blood to the testator, and the remainder going, on his death, to same charitable use. Assessed as were the rights of Mary Wadleigh Stokes in this case, the calculation by the collector would have been as follows:

Amount of trust fund	$1,500,000
Assumed rate of income thereon	.04
Estimated annual income	$60,000.00
Present worth of $1.00 annuity for life of person twenty-nine years of age (as used in this case—Record, p. 31)	$17.20225
Assessed value, i. e., product of last two items above	$1,032,135
Rate of tax per $100.00	$15
Amount of tax	$154,820.25

If the testator of the supposititious beneficiary in the above example had died when Tilden died and the tax had been paid on the same date as that paid out of Tilden's estate, the amount paid on August 16, 1900, would have exceeded the income of the beneficiary (assuming even that the quarterly payments began three months after the testator's death) by $79,820.25; in the supposititious case the beneficiary would have to live to receive eleven payments in order to have a small balance above the tax. If every cent of his income were retained by the trustees to cover the tax, and he died two years after his testator, the exempt legacy to charity of the whole principal of the trust fund would be depleted by $34,820.25.

> "It may be added, however, that the method of calculation adopted by the collector was also objectionable because it reduced the principal of the estate, and thus diminished the income of the widow, in effect taxing her without any authority for such taxation, * * *" Shanley *vs.* Herold (C. C. A.), 146 Fed., 20, 24.

It would be impossible practically to apply this tax in the manner contended for now by the Government without, in frequent and numerous instances, removing the burden from the individual legacies and throwing it upon the whole estate, and very often upon exempt interests therein. In Vanderbilt's case (196 U. S., 480) there were four named beneficiaries, two sons and two daughters, whose rights in the trust fund were to succeed in the order of their ages (except as to the daughters, who were to take equally), and in case of the death of all of them before the trust determined the decedent would have been intestate as to his residuary estate—presumably it would have passed under the intestate laws to his widow. The ages of these four children were not stated in the opinion, but Alfred G. was twenty-two at his father's death, and, for the purposes of the example, it will be assumed that the ages of the others were 20, 18, and 16, respectively. Now, suppose the fund had been put in trust for the life of whoever of these should eventually survive and the rights to income only bequeathed, the eldest to take first, on his death the next eldest, and so on. Then suppose Alfred G. had paid the tax on the estimated present worth of his rights to receive income during his full "expectancy of life," and then died, then the next beneficiary had so paid and died, and so all finally dying, and the whole residuary personal estate passing to the widow. A simple calculation, using the figures contained in the mortuary tables and the "present worth" tables for annuities promulgated by the Commissioner of Internal Revenue, shows that the taxes demanded and collected on the Government's present theory would have been—

On account of Alfred G. Vanderbilt's rights...	$310,834.32
On account of Reginald C. Vanderbilt's rights.	315,038.50
On account of Gertrude Vanderbilt's rights...	318,971.19
On account of Gladys Moore Vanderbilt's rights	322,642.13
Total collected	$1,267,486.14

The amount of the residuary estate was $18,972,117.46; if it produced four per cent the yearly income was $758,884.70, and it was taxed on that assumption. So if the above rights had been taxed in the way suggested and had all determined with a year, the widow's exempt share would have been depleted by the difference between $1,267,486.14 and $758,884.70, or $508,601.34. This is the *reductio ad absurdum* of the Government's theory. Will Government's counsel say that the deaths could not have occurred so closely together and in such succession? Or will he assert that if they had, the theory he supports would not have worked out in the way indicated?

TWENTIETH. THE THEORY OF THE LAW OF JUNE 13, 1898, FOR WHICH THE GOVERNMENT NOW CONTENDS, WOULD IMPOSE THE TAX BEFORE THE BENEFICIARY COULD BE IDENTIFIED. AS THE RATE OF THE TAX DEPENDS UPON THE RELATIONSHIP, OR LACK THEREOF, OF THE BENEFICIARY TO HIS TESTATOR OR INTESTATE, THIS CONSTRUCTION WOULD MAKE THE LAW INCONSISTENT WITH ITSELF.

The tax imposed by the act of June 13, 1898, was a tax on the exercise of the right to transmit and to receive personal property by will or under the intestate laws.

> "Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or *the transmission from the dead to the living*, on which such taxes are more immediately rested." Knowlton *vs.* Moore, 178 U. S., 41, 56.

"Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the *transmission or receipt* of property by death which is the subject levied upon by all death duties." Knowlton *vs.* Moore, 178 U. S., 41, 57.

"The thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the *transmission or receipt*, and not the right existing to regulate." Knowlton *vs.* Moore, 178 U. S., 41, 59.

"Certainly a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but *this is a burden cast on the recipient*, and not upon the power of the State to regulate." Knowlton *vs.* Moore, 178 U. S., 41, 60.

The late Solicitor-General, Honorable Lloyd W. Bowers, so recently and so lamentably called from the scene of earthly activity when at the height of his unusual powers and with the certainty of further brilliant achievement and invaluable service almost within his grasp, presented an accurate and plain statement of the meaning of the act of June 13, 1898, to this court in his brief in the Corporation Tax cases (Nos. 747, etc., October Term, 1909). After an extended quotation from the decision in Knowlton *vs.* Moore, *supra*, on pages 74 to 78 of that brief, he said:

"The distinction once more is found between taxation of the State's legislative act in creating the right to inherit property (whether or not the designated person chooses to exercise that right) and the actual, beneficial *exercise of that right* by the person who *elects to accept the inheritance*. It is, the court says, 'the exercise of such rights' created by the State that can be taxed by the United States." Brief, p. 78.

Continuing, the late Solicitor-General urged that both the existence of a corporation and the taking of a legacy or a

distributive share, though *permitted* by the legislative act of the State, require also "*an act of free choice or election, in accepting the offer,* by persons to whom the offer is extended" (Brief, p. 80), and he then contended that, having sustained in Knowlton *vs.* Moore, *supra,* the constitutionality of a Federal inheritance tax as an excise tax upon the exercise of such right of free choice or election, the same principle should be extended to the case then in hand. We quote again from his brief:

> "The reasoning of Knowlton *vs.* Moore (178 U. S., 41, 56-61) is again conclusive. It is as pertinent to show that Congress may tax the franchises of a State corporation as to show that it may tax the exercise or use of those franchises in the actual business. The corporate franchises, as we have just seen, do not arise directly or really from the State's legislative act, giving mere opportunity for incorporation, but from the actual use of that opportunity by the persons who elect to incorporate. The corporate franchises are the outgrowth of the *use or exercise* by private individuals of the privilege of incorporation offered by the law; *in the same way as receipt and enjoyment of a legacy or inheritance are the outgrowth or result of the* EXERCISE *of the privilege of taking by post mortem succession,* which is offered by the law." (Brief, p. 81.)

This view of the late distinguished, learned, and able Solicitor General, fully informed by his then recent participation in the presentation of Hertz *vs.* Woodman, *supra,* in this forum, seems to have been that adopted by the court, for in the decision in Flint *vs.* Stone Tracey Company (220 U. S., 107; 55 L. Ed., —), decided on March 13, 1911, we read:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.,* with the advantages which arise from corporate or *quasi* corporate organization, or, when applied to insurance companies, for doing the

> business of such companies. As was said in the Thomas Case (192 U. S., 363, *supra*), *the requirement to pay such taxes involves the exercise of privileges,* and the element of absolute and unavoidable demand is lacking. *If business is not done in the manner described in the statute, no tax is payable.*"

We apprehend that a tax on "the transmission from the dead to the living" (Knowlton *vs.* Moore, 178 U. S., 41, 56) by will or intestate laws implies at least three definite and ascertained things, and that these are (first) a decedent, (second) property, and (third) a legatee or distributee. But just as a corporate charter can be surrendered, in which case the tax on the exercise of the right to do business in a corporate capacity would fail, so a legacy or distributive share may be refused, in which case there would not be, by the original and presumptive legatee or distributee, any exercise of the right to receive or any transmission of property to him. But the need of an *ascertained* legatee or distributee is imperative, for the amount of the tax depends upon the relation, or lack of it, of the person who takes to the decedent.

> "* * * the statute makes five distinct classes or enumerations whereby the rate of the tax is varied, that is, it is made more or less, depending upon the relationship, or want of relationship, of the legatee or distributee to the deceased. But this enumeration can only be explained upon the hypothesis that the law intended to impose a greater or less tax upon a legatee or distributee, arising from his degree of relationship or his being a stranger in blood to the deceased. Thus it cannot be doubted that, in assessing the tax the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes." Knowlton *vs.* Moore, 178 U. S., 41, 66.

In the year 1900, when the pretended tax was collected on account of rights of Mary Wadleigh Stokes that, if she

survived, would extend far into the future, it was impossible to say who would receive the income from the trust fund in the year 1901 or at any time thereafter. Excluding the not remote possibility of her death prior to the end of her then "expectation of life," she had the right, and has had it, and so long as she has any rights under the will she will continue to have it, to refuse the income, to decline to exercise her right to receive. And in that case the amount would accrue to the exempt charities which her testator provided should follow her as the recipients of his bounty. In some other instance the refusal of one given a life income, in a similar manner, to accept it, might cause it to pass to a more remote relative of the decedent or to a stranger in blood, in which case the Government would, if the tax law were still in force, have the right to a tax at an higher rate. That there is nothing fanciful in the suggestion that a legatee may refuse to accept is shown by the brief in opposition to the Government's application for a writ of certiorari in the legacy tax case of Gill *vs.* Parrish (October Term, 1910, No. 763; 218 U. S., 677) in which it is stated that one ground for the recovery in that case, as shown by page 13 of the record in the Circuit Court of Appeals, was that:

> "The greater part of the tax ought not to have been assessed because a legacy of $150,000.00 on account of which it was assessed, had been disclaimed by the legatee and so did not pass to her from the testator, * * *" Brief, p. 6.

Hence, even if it were possible to assess the "actual" and "clear" value of a right to receive the uncertain and indefinite income of a trust fund throughout an uncertain and indefinite period of time to be ended by the incalculable contingency of an individual death, the actual beneficiary and, therefore, the rate of taxation, would remain unascertainable. The refusal of the beneficiary named in the will to accept further income from the trust, as well as his death, might at

any time put an end to his taxable rights and the property would pass to some one else from the original testator.

TWENTY-FIRST. THERE IS NO ADMINISTRATIVE INTERPRETATION OF THE ACT OF JUNE 13, 1898, OR OF ANY EARLIER LEGACY TAX ACT, WHICH COULD BE MADE TO SUPPORT THE CONCLUSION THAT THE PRETENDED TAX IN THE CASE AT BAR WAS AUTHORIZED BY THE STATUTE.

We are not unmindful of the Government's present contention, which was rejected by the court below, that there was an administrative interpretation of the act of 1898, which, it is further claimed, followed the administrative interpretation of the similar act of 1864, under which rights of the sort presented in this case were taxed in the manner here contested, and its assertion that this claim was, at least tacitly, sanctioned by this court in Knowlton *vs.* Moore, *supra* and in Vanderbilt *vs.* Eidman, *supra*. We propose to show not only that this claim is unfounded but, also, that these so-called "administrative interpretations" are merely *ex parte* claims of right that are necessary and intended to preserve the rights of the Government pending, and subject to, judicial inquiry and interpretation. As to Knowlton *vs.* Moore, the same contention was raised by the Government in support of its position in Vanderbilt *vs.* Eidman, and it was considered by this court, only to have its invalidity placed beyond question.

> "Before coming to the statute we put aside, as not directly decisive of the question here presented, a case referred to by both parties; that is, Knowlton *vs.* Moore, 178 U. S., 41; 44 L. ed., 969; 20 Sup. Ct. Rep., 747. Whilst that case involved the constitutionality of the act of Congress with whose meaning we are here concerned, it required a construction of that act only to the extent necessary to enable it to be decided what was the subject upon which the law levied the tax, and whether the statute required the tax levied to be progressively increased by reference to the whole amount of the estate of the decedent, or

> alone by reference to the particular legacy or distributive share upon the right to succeed to which the tax bore. The case did not, therefore, pass on the controversies here arising." Vanderbilt *vs.* Eidman, 196 U. S., 480, 489; 49 L. ed., 563, 566.

Nothing in the decision in Vanderbilt *vs.* Eidman necessarily implies that there was then known to the court any administrative interpretation of either the act of 1898, save (first) the original interpretation which held that such interests as were left to Alfred G. Vanderbilt, conditioned upon his living to the end of his thirtieth and thirty-fifth years, respectively, were not presently taxable; and (second) the later interpretation, made in view of the amendment of March 2, 1901, which held that these interests were taxable at their "present worths." The second administrative interpretation was condemned and the first declared to have been correct. A few extracts from the decision will show this:

> "Indeed, in accord with its text, and in harmony with the principles of construction expounded in the cases just cited, the act of 1898 was primarily construed by the officers charged with its administration as taxing only beneficial interests where the right to possess or enjoy had accrued. The rulings of the Internal Revenue Department to this effect were without deviation for several years." 196 U. S., 480, 497.

> "The amendments, therefore, did not, in our opinion, justify the construction that Congress intended, by adopting them, to cause death duties to become due within one year as to legacies and distributive shares which were not capable of being immediately possessed or enjoyed, and were, therefore, not subject to taxation under the original act." 196 U. S., 480, 498.

> "It is undoubtedly true that both under the act of 1862 and the act of June 30, 1864 (13 Stat., 285; chap. 173, U. S. Comp. Stat., 1901, p. 2268), there was an administrative construction by which vested interests, although unaccompanied with the right of

> immediate possession or enjoyment, were treated as at once taxable. Without entering into details on the subject, we content ourselves with saying that it is also true that the correctness of that construction was in effect repudiated by legislative action (act of July 13, 1866, 14 Stat., 140), and was, moreover, in substance, treated as unsound by the reasoning of the opinion in Clapp *vs.* Mason (94 U. S., 591; 24 L. ed., 213)." 196 U. S., 480, 501.

If it had been deemed expedient to amplify this portion of its opinion, the court no doubt would have referred also to the decision in Sturges *vs.* United States (117 U. S., 363), a case in which the pretended tax, under the statute of 1864, as amended, was exacted in respect of a payment of $100,000.00 which the testator had directed to be made to his legatee in the following words:

> "to be paid to him within three months after he shall arrive at the age of twenty-one years."

Here the legatee took precisely the same right to the payment as Mary Wadleigh Stokes took to each of the several payments which her testator directed should be made to her. There was no intervening or antecedent estate, and the testator died while the law was in force; but as the legatee did not become twenty-one years of age until February 21, 1872, this court held that the tax was unauthorized.

And so this court, in deciding Vanderbilt's case, said:

> "Thus, by legislative action and judicial interpretation, it came to pass that the acts of 1862 and 1864 signified exactly what we now construe the act of 1898 to mean. It was doubtless this concordance of legislative action and judicial interpretation concerning the earlier acts which caused the administrative department of the Government, when the act of 1898 was adopted, to interpret that act, not as the acts of 1862 and 1864 had been originally erroneously interpreted in administration, but in accord with the subsequent legislative and judicial construction which

had been placed upon the language of those acts, and which language in effect was repeated in the act of 1898." 196 U. S., 480, 501.

It is not necessary to deny that in the foregoing or in other places in the opinion in Vanderbilt's case there may be phrases or sentences which, if isolated from the context, if divested from the illumination which they ought to receive from the facts then before this court, and if considered without regard to the judgment then rendered, might seem to support the Government's contention. Whether such is or is not the case is utterly unimportant. The significant fact is that the administrative interpretation that was sanctioned was one holding certain rights *not to be taxable*, and the one condemned was one that held the same rights to be taxable. Vanderbilt recovered all for which he brought suit, and even if it were true that, to a superficial reader, a phrase or two in the opinion, separated from its context, might seem to justify the inference that if he had sued for something else he could not have recovered it, in the light of the whole language, scope, and effect of the opinion, the fact would be without materiality. And Vanderbilt did recover, as already seen, that portion of the tax assessed on rights to future income payments for which he brought suit. A decision that *something is not taxable* is certainly not authority for the contention that *something different is taxable.*

The cases presented to this court under the legacy and succession tax provisions of the act of 1864 and under the legacy tax provisions of the act of 1898 afford convincing evidence that the officers of the Treasury Department, in their administrative interpretations, consistently adopt that view which is most favorable to the collection of the tax. In other words, in their natural desire to protect the Federal revenue they uniformly ignore the rule that such taxing statutes must be construed so as to resolve doubts and ambiguities in favor of the citizen (Eidman *vs.* Martinez, *supra*). Five cases only involving the legacy and succession taxes

of the Civil War period appear to have reached this court. The first of these (Scholey *vs.* Rew, 23 Wall., 331; 23 L. ed., 99) raised no issue except as to the constitutionality of such taxation, but each of the others—Clapp *vs.* Mason (94 U. S., 589; 23 L. Ed., 212), Wright *vs.* Blakeslee (101 U. S., 174), Mason *vs.* Sargent (104 U. S., 689), and Sturges *vs.* United States, *supra*—raised some question as to the validity of an administrative interpretation which was decided against its validity. The administrative interpretations involved in all these cases were condemned by this court, with the single exception of one in Wright *vs.* Blakeslee, which held that the tax was properly collected on account of a succession to a remainder after a life estate in real property, the succession taking place while the law was in force, but having been provided for by the will of a testator who died in the year 1846, or before the tax was established; but in that case an administrative interpretation as to penalties was overruled. Under the law of 1898 administrative interpretations have fared little, if any, better. Ten cases have been decided by this court (excluding the five cases affirmed when the court was equally divided); all of these have presented questions relating to such interpretations, and in but two of them, including Hertz *vs.* Woodman (218 U. S., 205; 54 L. Ed., 1001), has the official view been fully sustained. It would be more satisfactory, perhaps, to state that these ten cases involved six principles which had been affirmed in administrative rulings, and that as to just half of these principles was the administrative interpretation upheld. The administrative interpretation applied by the Treasury Department in Knowlton *vs.* Moore, *supra*, was condemned, and the case controlled the decision in High *vs.* Coyne (178 U. S., 111), and Fidelity Trust & Safe Deposit Company *vs.* McClain (178 U. S., 113). Murdock *vs.* Ward (178 U. S., 139) and Sherman *vs.* United States (178 U. S., 150) follow Knowlton *vs.* Moore as to the administrative interpretation there involved, but sustain another administra-

tive interpretation, *i. e.*, one holding that the value of United States bonds ought not to be deducted from a legacy before computing the tax. Another administrative interpretation was rejected in Eidman *vs.* Martinez (184 U. S., 578), and that decision was followed in deciding Moore *vs.* Ruckgaber (184 U. S., 593). A third administrative interpretation was before the court in Vanderbilt *vs.* Eidman, *supra*, and was also declared invalid. The administrative conclusion that a legacy to a municipality, in trust for a public purpose, was taxable under this law was sustained in Snyder *vs.* Bettman (190 U. S., 249; 47 L. ed., 1035), the late Mr. Chief Justice Fuller and the late Mr. Justice Peckham, with the present Chief Justice, dissenting, and another administrative interpretation was sustained in Hertz *vs.* Woodman, *supra*, the late Mr. Chief Justice Fuller, Mr. Justice McKenna, and Mr. Justice Day dissenting.

The foregoing record is presented because it affords such conclusive evidence of the uniformity of the practice prevailing in the Treasury Department, the propriety of which is not questioned, of adopting that conclusion as to the intendment of a taxing statute which gives it the broadest application and produces the highest amount of revenue. If the inquiry were extended to include contested administrative interpretations which have been decided against the Government in the circuit courts of appeals and in the circuit courts and not brought to this court, the list of rejected interpretations would be much longer. An incomplete list of such cases arising under the act of June 13, 1898, includes Herold *vs.* Shanley (146 Fed., 20), Disston *vs.* McClain (147 Fed., 114), and Thacher *vs.* United States (149 Fed., 902). The basis of such a rule or policy is indicated by the following extract from an opinion of former Attorney General Miller:

> "Because a revenue law is indulgent to the taxpayer as to the costs and charges involved in collecting his taxes, it by no means follows that the same indulgence is extended to the taxes themselves.

> On the contrary, we know that it is the universal policy of governments to require prompt payment of taxes, and to provide also procedure to recover back afterwards any part of the amount so paid that is decided to have been illegally exacted." 20 Op. Atty. Gen., 183, 192.

The significant intimation in the foregoing is that the policy of the Treasury Department must be to demand payment in cases in which the law appears, to its officers, to be ambiguous or doubtful, and to refer those who may have been injured thereby to the Judicial Department of the Government for relief and redress. Nor is it difficult to comprehend the arguments which, in the mind of an earnest and faithful executive officer, must lead inevitably to the conclusion that this policy is the only one which he could follow with propriety or safety. The rigid application, by the executive department, of the rule laid down in Eidman *vs.* Martinez, *supra,* would certainly postpone the collection in many instances and it might make impossible the collection, as to many members of a class covered by a general principle, should the Judicial Department finally construe the law more favorably to the Government than it had been construed by the executive officers. At the least, any other policy would impose upon the Government the necessity of bringing a very large number of suits to protect its rights to recover taxes of the contested class and it is difficult to see how such suits could be effective unless they were docketed while the test suit was still pending. Yet a previous demand must be a necessary prerequisite to such a suit and it could not be made if the administrative interpretation was against the tax. Consequently, in every instance in which the Government decides to contest in the courts a view which would relieve any individual or any interest or property from a tax it is the practice to require all others similarly situated to pay the tax and either to bring suits of their own to recover or to await the decision of a test case or cases. Any other practice would be absurd and, of course, it is at least equally absurd to point to

such an "administrative interpretation" in support of the Government's position in the very suit which it was formulated to permit or in any other suit involving the same question. No tax suit is ever decided against the Government without overruling such an administrative interpretation.

Yet it was inevitable that the application of such a policy to the administration of the legacy tax law of June 13, 1898, should lead to the adoption of many administrative interpretations that would be disapproved by the courts and to the collection of a considerable aggregate which would have to be refunded. For, as this court declared in Knowlton *vs.* Moore, *supra,* the statute was by no means easy of interpretation.

> "It is at the outset obvious that the exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views." 178 U. S., 41, 62.

Had the Treasury Department followed any rule save that of resolving every doubt in favor of the tax, the administrative interpretation presented and condemned by this court in Vanderbilt *vs.* Eidman, *supra,* would have been impossible. For the precise question revived by that interpretation had been decided contrary to the view which it involved in Sturgis *vs.* United States (117 U. S., 363) and, even had the utmost liberality of construction been permissible, it is difficult to see any valid reason for asking for its reconsideration.

In a legacy tax case in the Circuit Court for the Western District of Missouri, Western Division, the Court, in deciding against the Government upon the same principle, observed the effect of this policy, saying:

> "The statute in question was open to two supposed constructions. The Commissioner of Internal Revenue adopted that construction in favor of the Government. In doing so, he acted in good faith, and with the best of motives. He believed he was within the

> law, and, so believing, exacted the return and the payment. But it turned out he was mistaken in his interpretation of the statutes, as was held by the Supreme Court in the case of Vanderbilt *vs.* Eidman, denying the contention of the Government, and its law officers, and reversing the circuit court." Armour *vs.* Roberts, collector, 151 Fed., 846, 850.

And it appears that this principle or policy of official interpretation is sometimes so applied as even to reverse rulings more favorable to citizens after some alleged taxes thereunder have been refunded. In Herold *vs.* Kahn (159 Fed., 608, affirming 147 Fed., 575) the question was whether rights to receive income during life were taxable, under the legacy tax law of 1898, on the full "present worth" of those rights, calculated for the full duration of the beneficiary's "expectation of life" at the time of her testator's death, although *in fact she had died even before the tax was assessed.* In deciding against the somewhat strained administrative interpretation that the tax should be so applied, and it had been collected in accordance with that interpretation, District Judge Cross, then sitting in the circuit court, said, in part:

> "Cases somewhat similar to the one at bar, but arising previously thereto, were brought to the attention of the court by counsel, from which it appeared that the Commissioner of Internal Revenue had in such cases granted like relief to that sought in this case. But when the facts in this case were brought to his attention for review, his reply was that the cases above referred to were either erroneous or had been overruled, presumably by himself." 147 Fed., 575, 583.

Such, then, is the policy controlling the formulation of administrative interpretations of Federal legacy tax laws, and such is the official atmosphere in which they are evolved. However laudable the purposes thus expressed, and however persuasive, in the official mind, the process of reasoning by which those purposes are sanctioned, it is respectfully sub-

mitted that administrative interpretations adopted in the execution of such a policy should carry but little more weight than any *ex parte* interpretation of a contract or a law by which one individual convinces himself that he is morally and legally justified in resisting in the courts claims made upon him by some other individual. The situation is far different in all its essentials from any in which an administrative interpretation, because of its long acceptance, because of general acquiescence, and because not inconsistent with the law, is entitled to the sanction of the courts when subjected to a belated challenge. Here the administrative interpretations are confessedly formulated in violation of the rule of construction which holds that a doubtful tax does not exist; that the legislature always expresses its will to tax in clear and unambiguous language; that doubts and ambiguities in a taxing statute must be resolved in favor of the citizen from whom the tax is claimed, and are, also, formulated for the almost openly avowed purpose of preserving, subject to judicial determination, rights of the Government which would otherwise lapse or become unenforceable.

Moreover, the administrative interpretation for which the Government now asks judicial sanction is inconsistent with the plain language of the taxing act; it would deprive the words "clear" and "actual," as used in that act, to modify "value" of all meaning; it would strike out the word "absolutely," which qualifies "vested," in the refunding act; it would render it impossible to deduct the tax, as the law required, from the legacy taxed, and it would cause the tax rate to be fixed by the relationship of a presumptive beneficiary who, by the mutations of time, might be unable to take the benefit on which the tax was assessed. An administrative interpretation that is plainly wrong is never sustained on any ground.

Appellant's Argument

In reply to section 1 of appellant's argument, pages 7 to 9, that the bequest to Mary Wadleigh Stokes is not a "contingent beneficial interest" within the meaning of the refunding act of June 27, 1902, attention is respectfully invited to the fact that the same argument, if sound, would also exclude remainder interests, like that involved in the Vanderbilt case, from classification under "contingent beneficial interests" as that term is used in that act. Counsel for appellant merely discusses such a technically vested interest as is described by Mr. Justice Lurton when speaking of the remainder interest in United States to the use of Hine *vs.* Morse (218 U. S., 493; 54 L. Ed., 1123), decided November 28, 1910, in which he says:

> "Clearly, under the will there was a life tenant and a remainder over at the death of the life tenant to Robert E. Hine, who was the issue of the testator and of the life tenant. The remainder was not absolute, for if the remainderman should die, and his mother, the life tenant, remarry, this lot was to be sold and the proceeds paid over to certain collaterals named. Technically the interest was a vested remainder, subject to open and let in the testator's brothers and sisters, and to be devested upon the death of Robert E. Hine and remarriage of the life tenant."

Such technical vesting cannot in any sense be referred to as "absolutely vested in possession or enjoyment prior to July 1, 1902." In this connection we invite attention to pages 23 to 29 hereof, where appellant's argument is more fully answered.

Section 2 of appellant's argument, pages 9 to 15, refers to the statement of this court in Vanderbilt *vs.* Eidman, *supra,* that no reason for the enactment of the refunding act had been suggested other than the change of practice mentioned by which remainders were taxed prior to their

actual vesting. It is suggested that this language of the court referred only to the case then before the court, and should not be otherwise applied, as this same refunding act also directed the refund of all taxes collected on philanthropic legacies which were property taxed under the law as originally adopted and in regard to which there had never been any change of practice.

What the refunding act did direct was the return of the taxes collected upon every species of contingent beneficial interests which had not been absolutely reduced to possession or enjoyment prior to July 1, 1902. The purpose of this provision is clearly to place in exactly the same position all persons who received the benefits of such interests while the law was operative. If they received the benefits during that period they were to pay the tax as specified, if they did not receive such benefits until after the law was repealed they were not to be subjected to such tax. Or as was so aptly pointed out by Chairman Payne, as quoted at page 14 of appellant's argument, the purpose was "not to require those who receive legacies which are to be paid after the first of July—some of them twenty and thirty years from now—to be taxed on these legacies, and not to require trustees and executors to pay such taxes." In all fairness this language must be construed to refer equally to annuities, life estates or estates for years as well as to remainders. In other words, it is applicable to all interests, the enjoyment or possession of which as an entirety is impossible before July 1, 1902. Any other construction would of necessity result in gross injustice and discrimination, and such a purpose cannot be imputed to the Congress. Indeed, as shown at pages 33 to 44 hereof, this court followed the very construction we have here suggested when in Vanderbilt *vs.* Eidman, *supra*, it directed the taxes to be returned which were collected on the present worth of the income from the half of the residuary estate which was to be paid to Alfred G. Vanderbilt when he arrived at the age of thirty-five

years. By analogy there seems to be no doubt that had the return of the taxes on the present worth of the income not received before July 1, 1902, from the other half of the residuary estate been claimed by the executors the court would also have decreed its refund. The petition did not ask for this and hence that question was not before the court in that case. Attention is also invited to pages 61 to 66 hereof.

As to section 3, pages 15 and 16, of appellant's argument, it is respectfully suggested that as the interest of Mary Wadleigh Stokes had not been completely reduced to possession or enjoyment by July 1, 1902, and hence only a fractional part thereof was at that time capable of being enjoyed, it is not seen how it could be properly said to have been other than a contingent beneficial interest not absolutely reduced to possession or enjoyment prior to July 1, 1902.

Appellant's argument under section 4, pages 16 to 23, can be conceded *provided* the law, as declared by section 3 of the act of June 27, 1902, does not direct the tax in this case to be refunded. Appellee's whole contention in this case, however, is directly to the contrary.

Attention is here invited to pages 71 to 74 and 103 to 104 hereof as to the provisions of the act of 1864, which are essentially different from those of the law which is here under consideration. Hence, it is repeated that under the act of 1898 and its amendments there was no authority for the use of any arbitrarily chosen or fixed rate of income, nor was there such authority for the use of any one of the many different varieties of life expectancy or mortuary tables for the purpose of computing the present worth of the interest bequeathed to Mary Wadleigh Stokes.

In reply to appellant's argument in section 5, pages 24 to 26, attention is invited to pages 71 to 74 hereof, in connection with the further suggestion that the amendatory act of March 2, 1901, adds to section 30 of the act of June 13, 1898, the following:

> "Any tax paid under the provisions of sections 29 and 30 shall be deducted from the particular legacy or distributive share on account of which the same is charged."

It is, therefore, urged that as the income bequeathed to Mary Wadleigh Stokes came into being progressively, as time elapsed after the death of her decedent, it was manifestly improper as well as a practical impossibility to deduct a tax from any income which was not in existence when such tax was collected. See Billings *vs.* People as cited in Vanderbilt *vs.* Eidman, 196 U. S., 497.

It is respectfully suggested that this addition to section 30 which was made by the amendatory act of March 2, 1901, does not appear to be in any sense a legislative approval of the departmental construction theretofore employed in the collection of taxes on the estimated present worths of either annuities, life estates, or estates for years.

In reply to section 6 of appellant's argument, pages 26 to 29, attention is invited to the exhaustive discussion of the propriety of the use of mortality or life-expectancy tables to be found at pages 74 to 96 hereof.

In respect to the discussion of "the authorities" in section 7 of appellant's argument, pages 29 to 37, attention is invited to the fact that the circumstances in Title Guarantee and Trust Company *vs.* Ward, 164 Fed. Rep., 469, affirmed on appeal, 184 Fed. Rep., 447, were very different from the case at bar. Here there is simply a naked right to the income whatever it may be so long as the life tenant may survive, while in the case above referred to the beneficiary was given not only the absolute right to the enjoyment of the income, but also the absolute right of disposition of the corpus. It may be pertinent to inquire of appellant what contingency in such a case was possible to arise which would divest any of the rights of such a beneficiary.

As to the cases of Westhus *vs.* Union Trust Company, 164 Fed. Rep., 795, and Chouteau *vs.* Allen, 170 Fed. Rep., 412,

it seems sufficient to suggest that the former case, which controlled the latter, is now on appeal. See also pages 50 and 51, hereof. These and the other authorities referred to by the counsel for appellant have all been exhaustively discussed in the preceding pages of this argument.

All of which is respectfully submitted.

A. R. SERVEN,
H. T. NEWCOMB.
MORRIS F. FREY.
R. W. JOYCE.

APPENDIX.

THE STATUTES.

The acts and parts of acts to be considered in this proceeding, except the act of June 27, 1902, which is to be found on page 2 hereof, are as follows:

EXTRACTS FROM WAR REVENUE ACT.

"SECTION 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say:

"Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

"Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

"Third. Where the person or persons entitled to any bene-

ficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

"Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest:

"*Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half;

"and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two;

"and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half;

"and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three." Act of June 13, 1898; 30 Stat., 448.

"SECTION 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall,

within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided.

"Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators." Act of June 13, 1898; 30 Stat., 465.

"Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged." Amendment added to section 30 of the act of June 13, 1898, by act of March 2, 1901; 31 Stat., 948.

EXTRACTS FROM REPEALING ACT.

"SECTION 7. That section * * * twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and all amendments of said sections and schedules be, and the same are hereby, repealed.

"SECTION 8. That all taxes or duties imposed by section twenty-nine of the act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows:

* * * * * * *

"SECTION 11. That this act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two." (Act of April 12, 1902; 32 Stat., 97, 98, 99.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 280

Office Supreme Court U. S.
FILED
NOV 2 1911
JAMES H. McKENNEY,
Clerk.

THE UNITED STATES,

Appellant

vs.

THE FIDELITY TRUST COMPANY (FORMERLY THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY), AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WALTER H. TILDEN, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

PAUL FULLER,
BARRY MOHUN,
Counsel for Appellee.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE UNITED STATES, Appellant, *v.* THE FIDELITY TRUST COMPANY (formerly the Fidelity Insurance, Trust and Safe Deposit Company), as Executor and Trustee under the Last Will and Testament of Walter H. Tilden, Deceased.	No. 280.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the Appellee.

Statement.

For the purpose of this argument the appellee adopts the statement of the case as contained in the brief on behalf of the Government.

Outline of Argument.

I. THE REFUNDING ACT OF JUNE 27, 1902, MUST BE LIBERALLY INTERPRETED.

II. OF THE TOTAL AMOUNT OF TAXES PAID BY APPELLEE SO MUCH THEREOF AS WAS PAID ON ACCOUNT OF INSTALLMENTS OF INCOME WHICH IT WAS ASSUMED, BY THE COLLECTOR, MARY WADLEIGH STOKES WOULD RECEIVE SUBSEQUENT TO JULY 1, 1902, IS REFUNDABLE UNDER THE ACT APPROVED JUNE 27, 1902.

(a) *The Refunding Act embraces taxes collected on remainder interests accruing subsequent to July 1, 1902.*

(b) *The Refunding Act embraces taxes collected on annuity payments accruing subsequent to July 1, 1902.*

(c) *The principle involved in the taxation of, and the refundment of taxes collected upon, remainders and annuities and ordinary income payments (as in the case at bar) is the same.*

III. THE COLLECTION OF TAXES ON ACCOUNT OF INSTALLMENTS OF INCOME WHICH IT WAS ASSUMED MARY WADLEIGH STOKES WOULD RECEIVE SUBSEQUENT TO JULY 1, 1902, WAS UNAUTHORIZED BY THE TAXING STATUTE.

(a) *The Act only taxed the clear and actual value of that which actually passed to the legatee or distributee.*

(b) *The use of Mortuary Tables and of an assumed rate of interest were both unauthorized by the Taxing Statute.*

(c) *The History of Death Duty legislation in this country confirms the foregoing propositions.*

IV. NOTES ON BRIEF ON BEHALF OF APPELLANTS.

V. CONCLUSION.

Appendix.

Brief Review of Cases.

I.

The Refunding Act of June 27, 1902, must be liberally interpreted.

The relief sought in this case, and for which judgment was rendered in the Court below, is based upon the third section of the Act approved June 27, 1902, (32 Stats. 406) and known as the Refunding Act, which is as follows:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight entitled 'An Act to provide ways and means to meet war expenditures and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being

made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July 1st, 1902. And no tax shall hereafter be assessed or imposed under said Act approved June 13, 1898, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

In the spring of 1902 the Spanish War Revenue Law had been in force nearly four years. With its revenue thus greatly increased the Government had been more than able to meet the heavy expenses incident to the war.

By Act of April 12, 1902 (32 Stat., 97), Congress repealed the War Revenue measures to take effect July 1, 1902. The report of the Ways and Means Committee on the repealing act graphically portrays the condition of the country's treasury:

"It is a wonderful condition of our national finances which enables Congress to propose a reduction of $73,000,000 in the annual revenues. History furnishes no parallel to the situation. We had on the first day of the present month in the Treasury an available cash balance of $177,632,088.26, and this notwithstanding the fact the Treasury has paid out of this available surplus during the present fiscal year in the purchase of bonds for the sinking fund the sum of $61,196,444.56.

"The Secretary of the Treasury in his annual report estimated the surplus of revenue over expenditures for the present fiscal year at $100,000,000. Subsequent events have confirmed this estimate as conservative and reasonable. With this surplus for the year, it would seem that notwithstanding this reduc-

tion of $73,000,000, we will still have a surplus of $27,000,000 for the next fiscal year." (H. R., Rep. 320, 57th Congress, 1st Sess., p. 3.)

Such evidence is competent.

Binns *v.* United States, 194 U. S. 486, 495;
Johnson *v.* United States, 196 U. S. 1, 19.

While this plethoric condition of the public purse still existed, in fact within less than three months after the passage of the act repealing the taxing statute to take effect July 1, 1902, the Refunding Act of June 27, 1902 was enacted, and in that act, Congress used language to indicate the intention to refund, of a broader character than that of the Tax Act. The latter did not state in terms that *absolute* possession or enjoyment was a condition precedent for the collection of the tax; indeed by the very words of the Refunding Act, Congress recognized that taxes had been and might subsequently be collected upon legacies and distributive shares where there was something short of vesting *absolutely* in possession or enjoyment. The words "absolutely", "administrator" and "distributive share" are used in the refunding act and they cannot be ignored any more than the fact that when the Taxing Law was passed the Government required large sums to meet war expenses and that when the Refunding Act was enacted the emergency had long ceased to exist and the National Treasury was full to overflowing.

The other sections of the act of June 27, 1902 clearly disclosed the liberal policy which actuated Congress in the enactment of the law. By the first

section taxes, which had been *legally* collected, were ordered returned. By the second section taxes, which had been *illegally* collected, were refundable and by the fourth section there was a liberal remission of taxes. Of the third section (the Refunding Act) the Attorney-General stated:

> "It will be observed that under the provisions of this statute Congress has granted a right of repayment, regardless of any conditions that may have heretofore operated as a bar to such repayment." (26 Op. Atty-Genl. 195, 197.)

The refundments are all to be made without regard to any statute of limitations. The whole act is obviously remedial in character and entitled to that construction which will carry out the liberal purpose of Congress at the time of its enactment. The opinion of Acting Attorney-General Beck of August 1, 1902 (24 Op. Atty. Genl. 98) so narrowed the construction of the third section that it was rendered practically a dead letter and it so remained until the decision of this Court in Vanderbilt v. Eidman (196 U. S. 480) rendered on February 20, 1905. The Acting Attorney-General there said of the Refunding Act (p. 100):

> "In such case the subject of exemption was the same, viz, contingent interests in the *technical legal sense* . . . . . "

an interpretation diametrically opposed to the opinion of this Court, afterward rendered, in the Vanderbilt case. To this and to subsequent action by the Treasury Department under the Refunding Act reference will be more fully made later.

Further evidence of the remedial character of the Refunding Act is found in the fact that it is

applicable to distributive shares of estates of intestates. Clearly under the taxing statute the shares of an estate of one dying intestate prior to July 1, 1902, were subject to the tax upon the right of succession to such shares. The tax was imposed as of the date of death, although not collectible nor measurable until the right to possess or enjoy had accrued. (Hertz v. Woodman, 218 U. S. 205, 219). In this connection attention is called to the fact that the Hertz case was one against the Collector for taxes alleged to have been *illegally* collected. A question of law was certified to this court by the Circuit Court of Appeals for the Seventh Circuit under the sixth section of the Act of 1891 creating those courts. The sole issue was as to the *legality* of the tax under the taxing law. Under the question certified the Refunding Act was not and could not have been considered and hence it is not mentioned in the opinion of the Court nor in the dissenting opinion.

The express terms of the Refunding Act apply to and include "distributive shares." Administrators of intestate estates, who had been obliged to pay the tax, could under the Refunding Act receive the taxes back, unless the interests of the distributee or next of kin were "absolutely vested in possession or enjoyment" prior to July 1, 1902. This is the express command of the Act in plain and unambiguous terms, and it strips that remedial statute of the extremely technical reservations as to "contingent" interests, which the Government would fasten upon it and illustrates how broad was the intention and how liberal was the purpose of Congress in the enactment of the Refunding Act.

II.

Of the total amount of taxes paid by appellee, so much thereof as was paid on account of instalments of income which it was assumed, by the collector, Mary Wadleigh Stokes would receive subsequent to July 1, 1902, is refundable under the act approved June 27, 1902.

(a) *The Refunding Act embraces taxes collected on remainder interests accruing subsequent to July 1, 1902.*

The illegality of taxes collected upon remainder interests not due until subsequent to July 1, 1902 was established in the case of Vanderbilt v. Eidman (196 U. S. 480). In regard to the provisions embodied in the two sentences of the Refunding Act the Court at page 500 said:

> "It is, we think, incontrovertible that the taxes which the 3d Section of the Act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section, and cause its provisions to produce inexplicable conflict. From this it results that the taxes which are directed in the first sentence to be refunded, because they had been wrongfully collected, on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute

> provided for the refunding of taxes collected under the circumstances stated, and at the same time forbade like collections in the future."

On the same page the present Chief Justice, speaking for the court, said of the Refunding Act that it was "in a sense declaratory" of the Taxing Act.

The words "in a sense declaratory" etc. would seem to indicate, in view of the fact that so far as that case was concerned it was clearly declaratory in regard to both the taxation and refundment of taxes on remainders, that the court then recognized the act might in another case also be declaratory or even go beyond and include the refundment of taxes which had been legally collected. While we have pointed out that the Refunding Act went further than merely being declaratory of the Taxing Act, in that by its express terms it applied to cases of intestacy, this position is not necessary to an affirmance of the judgment in this case. It simply serves to show the broad effect of this remedial act.

After referring to the fact that nowhere in the taxing statute is there "language referring to technical estates in personality or treating them as subject to taxation, despite the absence of the right to immediate possession or enjoyment" (p. 494) this Court in the Vanderbilt case said:

> "Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interest of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned upon his attaining the ages of thirty and thirty-five years, respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as

claimed by counsel for the Government." (196 U. S. 501.)

In view of the holding of this Court that the Refunding Act is in a sense declaratory of the taxing act it is plain the sentence last quoted is applicable to both the Taxing and the Refunding Act. Indeed, immediately after the opinion in the Vanderbilt case was rendered, the Treasury Department, adopting precisely this construction, began the refundment of taxes collected upon remainder interests under the Refunding Act. Under date of February 25, 1905, the opinion in Vanderbilt v. Eidman appeared in "Treasury Decisions" preceded by the following:

> "Secs. 29 and 30, Act of June 13, 1898, do not authorize the assessment and collection of a tax with respect to any rights or interest passing to a beneficiary, except such as became absolutely vested in possession or enjoyment. The Act of June 27, 1902, section 3, provided for the refunding of taxes collected on such beneficial interests as had not become vested in possession or enjoyment prior to July 1, 1902, and at the same time forbade like collections in the future." Treasury Decisions, Internal Revenue, Vol. 8 p. 14 No. 868.)

It is clearly shown from the above that the Treasury Department promptly acted in accordance with the statement in the opinion in Vanderbilt v. Eidman that the Refunding Act is declaratory of the taxing statute.

Taxes collected on remainder interests were and are refunded not as taxes illegally collected but as moneys directed to be refunded and the refundments are made from the special appropriation contained in the Refunding Act, and not from the

permanent appropriation for the refundment of taxes illegally or erroneously collected provided by Sec. 3689, Revised Statutes. The practice of the Treasury Department in this respect has never been departed from. It has been continuously adhered to for over six years and still prevails. It thus appears that the words "contingent beneficial interests which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two," have been finally accepted as at least embracing remainder interests, whether vested or contingent, which under the testator's wills were not payable to the legatees until subsequent to July 1, 1902; and further that taxes collected on such interests have been since the decision in Vanderbilt *v.* Eidman, *supra,* uniformly refunded by the Secretary of the Treasury under the authority and from the special appropriation, contained in the Refunding Act.

(b) *The Refunding Act embraces taxes collected on annuity payments accruing subsequent to July 1, 1902.*

The question of the legality of taxes upon annuity payments not due the beneficiary under the terms of the will until subsequent to July 1, ~~1902~~, 1902 the date of the repeal of the law, was presented in the case of Disston v. McClain, (147 Fed. Rep. 114).

Under the will there involved the annuitant, Rachael Asch, was entitled to receive from the executors or trustees $15,000 annually, payable in quarterly installments. Prior to July 1, 1902, the annuitant actually received $30,000, which was the full amount to which she was, up to that time,

entitled, and upon which the tax was $2,250. She was compelled, however, to pay a tax greatly in excess of that amount. The action was brought for the recovery of all taxes collected upon annuity payments accruing subsequent to July 1, 1902, or "for the repayment of the portion of said tax which was collected on said contingent beneficial interest of the said Rachael Asch, which had not become vested prior to July 1, 1902." (147 Fed. Rep., 115.)

After referring to the fact that the legacy to the annuitant was not the corpus of the estate but simply the right of receiving $15,000 each year in quarterly payments, Judge Gray said:

> "The natural meaning of such a provision, and of the language used, would seem clearly to be a series of legacies or bequests vesting in possession or enjoyment at stated intervals, but each contingent, before vesting, on the legatee's being alive when it became due, the tax on which is not to be paid, as we shall see presently from the authoritative opinion of the Supreme Court in the Eidman case, until and as it takes effect in possession or enjoyment" (147 Fed. Rep., 117).

The court further said:

> "The statute nowhere refers in express terms to the interest or income of a legacy, nor does it impose any tax in respect thereto, before it is actually received. If the act had intended that the interest in a fixed and definite income for life, payable out of personalty alone, much more in such an income payable *out* of the total income of the whole residuary real and personal estate, should be taxed, this intention would not be left to inference, but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done in the collateral

inheritance tax laws of the states of New York and New Jersey." (147 Fed. Rep., 122).

Application was made to this court on behalf of the Government for writ of certiorari in the case of Disston *v.* McClain which was denied on October 21, 1907 (207 U. S., 587).

Concerning what subsequently transpired we quote from Appendix A, page 20 of Motion to Dismiss or Affirm heretofore filed herein consideration of which was postponed until the hearing of this case on the merits:

> "On October 21, 1907, this Honorable Court denied the application made on behalf of the Collector for writ of certiorari in the case of Disston v. McClain (207 U. S., 587), and immediately thereafter the Secretary of the Treasury acquiesced in the doctrine of that case and began the refundment under the third section of the Act of June 27, 1902, as aforesaid, of all moneys collected as taxes upon estimated and calculated present worths of definite annuities, to the extent that such sums had been so collected upon payments due the annuitants subsequent to July 1, 1902, the date when the repeal of the taxing law took effect; and the Secretary of the Treasury has ever since and will now, without regard to lapse of time, upon due application being made therefor, so refund all such moneys.
>
> Among numerous other refundments made by the Secretary of the Treasury on account of annuity payments was one to appellee herein as executor under the will of John N. Hutchinson, late of Philadelphia, Pa., by which $8,166.84 were refunded to appellee as such executor on December 9, 1907, the refundment being made under the Act of June 27, 1902, and represented taxes collected upon annuity payments not due until subsequent to July 1, 1902."

The words "beneficial interest" occur both in the Refunding Act and in the Taxing statute. In the former, which relates only to "legacies or distributive shares," it is apparent the words "beneficial interest" mean either legacy or distributive share as the case might be. In the latter they embrace also property passing by deed, grant, etc., to take effect after death. The words are employed in these acts as a generic term embracing the particular interests there specifically mentioned. An examination of the acts leaves no room for doubt in this matter. Hence any broad or general definitions of these words are inappropriate in the ascertainment of their meaning as used in these statutes.

Bearing in mind this obviously correct meaning of the words "beneficial interest" and thus reading the Refunding Act, its interpretation is greatly simplified. The words "legacies and distributive shares" as used in the Taxing Statute (and it may be confidently assumed they were used in the same sense in the Refunding Act) were clearly defined by Judge Gray in the Disston case, as follows:

> "These words possess a definite meaning, and no confusion or difficulty need arise as to the subjects with reference to which taxation is imposed. Legacies and distributive shares are classed together, and as a distributive share is a definite portion in money of the residue of the personal estate of an intestate, so a legacy is a definite gift by will of personal property, either general and pecuniary, or specific. As such, a legacy is of a specific article, or of specific articles, of personal property, or of an ascertained and definite pecuniary amount, and may be readily valued by the executor or trustee having it in charge. It is the corpus to which the legatee is entitled

in possession or enjoyment." (147 Fed. Rep. 114, 117.)

The Refunding Act directs the return of taxes collected on contingent legacies. A "legacy" under both the Taxing Statute and Refunding Act is a definite portion of personal property, taxable when and as received. This feature of the taxing statute is further dwelt upon under Point III of this brief.

We have thus seen that the present practice of the Treasury Department in refunding moneys, collected as taxes on remainders, under the authority and out of the appropriation contained in the Refunding Act has continued unbrokenly for over six years and that likewise the present practice of the Department in refunding moneys collected as taxes upon the deferred payments of annuities, under the authority and out of the appropriation contained in the Refunding Act has continued unbrokenly for nearly four years. This action by the Department in each instance is based upon the fact that the Refunding Act is declaratory of the Taxing Act.

The weight to be accorded the administrative construction of the Refunding Act is far greater than that to which the action of the officials in the enforcement of the Taxing law is entitled. In the first place it will be noted that to a large extent, viz: the refundment of taxes on remainders and annuities the construction of the Refunding Act is in effect a repudiation of the department's prior construction of the Taxing Act, especially after the amendment of March, 1901. But further the conditions under which the two acts were construed were essentially different. The payment of

funds from the National Treasury is always characterized by the exercise of great care and caution. There is no reason to believe that, in the payments made under the Refunding Act of taxes which had been collected upon remainder interests and annuities, the practice was departed from.

The Taxing Statute was, however, a war measure. It was passed to raise funds to meet a sudden emergency. Under all such circumstances officials charged with the duty of collecting revenue not only proceed promptly but determine doubtful questions in favor of the Government. This is customary and Congress in recognition of the practice has passed laws for the protection of those who are required to pay what may be subsequently determined to have been an illegal tax.

Attorney General Miller dwelt on this when he stated:

> "Because a revenue law is indulgent to the taxpayer as to the costs and charges involved in collecting his taxes, it by no means follows that the same indulgence is extended to the taxes themselves. On the contrary, we know that it is the universal policy of governments to require prompt payment of taxes, and to provide also procedure to recover back afterwards any part of the amount so paid that is decided to have been illegally exacted" (20 Op. Atty. General 183, 192).

It has thus transpired by the action of this court, viz: its opinion in the Vanderbilt case and its denial of certiorari in the Disston case, and by action of the Treasury Department taken in accordance with both of the above, that the Refunding Act has been definitely and continuously construed as being declaratory of the taxing statute and as embracing taxes collected upon remainders in per-

sonal property, accruing subsequent to the repeal of the taxing law, and also taxes upon annuity payments likewise accruing after the repeal of the law.

As heretofore shown appellee herein as executor under another will has had refunded to it over $8,000 representing taxes collected upon such annuity payments. The moneys thus returned being under the authority of and from the appropriation, contained in the Refunding Act. No doubt there have been hundreds of other refundments so made.

(c) *The principle involved in the taxation of, and the refundment of taxes collected upon, remainders and annuities and ordinary income payments (as in the case at bar) is the same.*

In support of the above we first cite a simple example which will not only disclose that the principle involved in these cases is identical but will graphically illustrate the inconsistency and unsoundness of the Government's position in this case.

Let it be assumed that a son was given by his father's will an annuity of $4,000 per annum for life and that a daughter, a person of the same age, was given by her father's will the income from $100,000 for life.

In the case of the son, the annuity value of one dollar for a person of that age would have been ascertained from the arbitrarily selected tables and this sum would have been multiplied by 4000, (the amount of the annuity) and upon the product thus obtained the tax would have been collected exactly as though it had been a cash bequest of that amount.

In the case of the daughter, it would have been first assumed she would receive exactly four per centum of the principal each year, or an annuity of $4,000. The remaining steps would have been the same as in the case of the son. Each would have paid the same amount of tax. It thus appears the steps in each instance were identical except there was the additional arbitrary assumption in the daughter's case that she would each year receive exactly four per centum of the principal.

Under the practice of the Treasury Department, so much of the tax as was paid on income payments due subsequent to the repeal of the law would be returned to the son, under the Refunding Act, on the theory that not only were such taxes directed to be refunded by that act, but were also illegally collected under the Taxing Statute; the former being declaratory of the latter. Refundment to the daughter would be refused upon the theory that such taxes were not included within the Refunding Act and further that they were legally collected.

Can it be said that the son's right to $4,000 each year is any more contingent or any more vested than the daughter's to such income? Indeed were the rights of either to future payments any more vested or any more contingent than in the case of an ordinary vested remainder in personal property?

Where a legatee has the right to receive at stated intervals the income from personal property during his life or for a term of years, each and every periodical payment is separately conditioned upon the beneficiary being alive to receive such payment. There cannot, therefore, be any legal distinction between the right to the corpus, or, a part of the corpus of an estate, the pay-

ment of which is conditioned upon the beneficiary being alive on the date of payment, and the right to the income, each payment of which is likewise conditioned upon the beneficiary being alive on the date of payment.

Counsel for the Government in the Vanderbilt case recognized the patent fact that there would, in such cases, be no legal distinction and referred to it in his brief. The Assistant Attorney-General in reference to an argument of counsel for the Vanderbilt estate said (p. 26):

> "His theory leads us naturally to conclude "that the income should not be taxed until it "was actually earned and ready to be paid "over to him [the beneficiary]. The income "he will receive in his thirtieth year is no more "vested in possession or enjoyment than is "the principal that will be paid him when "thirty or thirty-five. *Both are subject to be "divested if he dies before reaching that age.*
>
> "His arguments in support of his conten- "tion that vested remainders should not be "taxed before vesting in possession or enjoy- "ment apply with equal force to the same "conclusion about the income."

In urging the court to grant the writ of certiorari in the Disston case the learned Solicitor-General in his brief conceded the principle there involved (annuities) embraced the question of the taxation of incomes for life in personal property. In the brief in support of the motion it is stated (pp. 1 and 2):

> "The Circuit Court of Appeals held in substance, reversing thereby the Circuit Court, that no part of a legacy *consisting of a life interest in personal property* was taxable beyond that portion of such interest which became absolutely vested in physical possession

prior to July 1, 1902, the date of the repeal of the War Revenue Act." (pp. 1 and 2).

In the case at bar the Court below found as facts that:

> "In the above process of calculations and estimates the officials of the Internal Revenue Bureau, by the use of 4 per centum as the value of money, reduced the expected income to be enjoyed by Mary Wadleigh Stokes to the basis of *an annuity or a life estate,* with the annual income of $4,312.15 and taxed the same as such." (Rec. 32.)
>
> See also opinion on this point Rec. 25.

In "Exhibit A" in the Findings of Fact (Rec. 31) it is shown that the "*annuity* value" of Mary Wadleigh Stokes' interest was calculated by the Collector.

In 26 Op. Atty.-Genl. 194, a letter of inquiry of the Commissioner of Internal Revenue to the Secretary of the Treasury, which occasioned the opinion, is in part set forth. In such letter the Commissioner in referring to the Disston case said:

> "The Circuit Court of Appeals in the Disston case held, in effect, that a *life estate,* or *an estate for years,* could not be taxed, except in so far as the income from that estate had become vested in the possession of the life tenant prior to July 1, 1902." (p. 196.)

As aptly stated by Judge Morrow in Union Trust Co. *v.* Lynch (148 Fed. Rep., 49, 55):

> "If it is not the law with respect to the corpus of the estate, it is not the law with respect to the income of the estate, because there is no discrimination in the statute be-

tween the income and the corpus of the estate."

It is here pertinent to remark that neither does the Refunding Act make any distinction between the corpus of an estate and the income therefrom.

We invite the Court's careful attention to the case of Union Trust Co. vs. Lynch (148 Fed. Rep., 49) in which the taxation of incomes, was involved and in which judgment against the Government was rendered. The identity of the principle is there clearly shown. The case was affirmed by the Circuit Court of Appeals (164 Fed. Rep., 161) and on May 17, 1909, this Court denied the application made on behalf of the Government for writ of certiorari (214 U. S., 523).

We adopt the syllabus of the opinion in the Circuit Court as a concise statement of the facts and the ruling of the court on the question:

> "Where the children and legatees of a testator were to receive only the income from their respective shares in the estate until they reached stated ages, which did not occur in any case until after July 1, 1902, when the repeal of section 29 of the War Revenue Act of June 13, 1898, C. 448, 30 Stat., 464 (U. S. Comp. St. 1901, p. 2307), took effect, *under Act of June 27, 1902*, C. 1160, Sec. 3, 32 Stat., (U. S. Comp. St. Supp. 1905, p. 450) which provides that no tax shall be assessed under said Section 29 in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902, and that any such tax previously collected shall be refunded, the interest of such legatees for the purpose of taxation was the value of the income received by each respectively from the estate prior to said July 1, 1902, which was subject to the

> tax only in case it amounted to $10,000, and in computing such amount allowances made by the Probate Court for their support pending settlement of the estate cannot be included."

Judge Morrow in his opinion in Lynch *v.* Union Trust Co., says that "The Commissioner of Internal Revenue, in June, 1901, determined the then present value of this estate to each of the heirs *as an annuity,* until the time they should arrive at the age specified in the will" (148 Fed. Rep., 50). At page 53 the third section of the Act of June 27, 1902, is set forth in full. It is shown by the following that the court held the collection of taxes upon income to be paid subsequent to the repeal of the law was prohibited by the second sentence of the Refunding Act of June 27, 1902:

> "In the case of James H. Follis the Commissioner of Internal Revenue found that he would have an income from this estate for a period of 5 years and 225 days, and the Commissioner assessed him for the value of an *annuity* during that time. Of course, for such a period the valuation amounted to over $10,000. But here is the difficulty about that assessment. The tax did not run for any such time. The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence 1 year and 4 days, and this statute says specifically, that when it is not vested at the time the repealing statute went into effect, no tax shall be collected; that is, the specific command of this statute is that unless a person receives a legacy of more than $10,000 which vests in the absolute possession and enjoyment of such person prior to the passing of this repealing act there can be no tax. That is a specific, direct, positive, un-

qualified direction of the statute, which the court cannot evade" (p. 54).

Again:

> "In the Vanderbilt case that method of determining a taxable legacy has been condemned with respect to the corpus of the estate. The method of procedure adopted in the Vanderbilt case to determine the value of that estate at the time of the decree of distribution is the same as has been adopted in this case, and the Supreme Court has said: 'You cannot do that.' These actuary tables have reference to quite a different subject, and cannot be introduced here to determine the present value of an estate for taxation when such estate can only be taxed when it comes into the absolute possession of the heirs many years later. If it is not the law with respect to the corpus of the estate, it is not the law with respect to the income of the estate, because there is no discrimination in the statute between the income and corpus of the estate." (p. 55.)

On appeal (164 Fed. Rep., 161) the court in its unanimous opinion sets forth the position of the Government in the language of its counsel as follows:

> "It is to be noted that the tax was not imposed upon moneys or personal property to be actually received by or passing into the hands of the legatees. The tax was imposed upon the right of each legatee to enjoy the income from the corpus of the trust estate, which was delivered to the trustees for the benefit of the various legatees. The property is to be managed by the trustees for the sole use and benefit of the legatees. The lega-

tees receive the whole of the income therefrom, They are the true owners for a stated term.

* * * * * * * * * * *

"The position of the Government in the case is that each of the legatees virtually received an equitable estate for a term in a portion of the trust estate.

"The action of the collector amounted to the levying of the tax upon an equitable estate for a term of years; the legal title to the term being in the trustees, but the enjoyment of the property being vested entirely in the beneficiaries."

The court then adds:

"This fairly presents the attitude of the Government in the controversy, and is, perhaps, as strong a statement of the case as the facts would warrant." (p. 163.)

The material portions of Section 29 of the Taxing Act are incorporated in the opinion:

The court then states:

"Subsequently, on June 27, 1902 (Act June 27, 1902, C. 1160, Sec. 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1907, p. 652], Congress passed an act, commonly known as the 'Refunding Act,' which authorized and directed the refunding by the Secretary of the Treasury, upon proper application, of all such taxes 'as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two,' and provided that no tax should thereafter be assessed or imposed, under said war revenue act, 'upon or in respect to any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two.' This was the state of the legislation at the time the present action arose.

"But three cases have been cited as bearing in any wise directly upon the particular question involved. The first, or leading case, is that of Vanderbilt *v.* Eidman, 196 U. S., 480, 25 Sup. Ct. 331, 49 L. Ed. 563, where the act and its amendments, *as affected by the provisions of the refunding act,* were under consideration by the Supreme Court, and its general scope and purpose and the rules of interpretation to be applied in ascertaining its limitations were very thoroughly gone into." (p. 164.)

Again:

"The case of Disston v. *McClain (147 Fed. Rep., 114), above referred to, is more nearly analogous to the present, if, indeed, it may not be said to be exactly on all fours."* (p. 165.)

The opinion of Judge Gray is quoted from and the fact that the two cases are "on all fours" is clearly demonstrated. The court continues:

"Confessedly the only present right passing to these beneficiaries was that of receiving the income from the corpus of the estate, in the hands of the trustees. Such an interest does not, for the reasons aptly stated by Judge Gray in Disston *v.* McClain, fall within the definition of either a legacy or a distributive share, in the sense in which those terms are employed in the act. It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the act undertake to impose any burden upon such an interest? Very

clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual, and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose. Instead, Congress has contented itself, in designating the estates that shall be burdened with the tax, by employing terms having general and well-understood significations, and by those terms must its purpose be limited.

"Moreover, as held in Vanderbilt *v.* Eidman, the purpose of the act was to subject to taxation only beneficial interests, which by reason of being absolutely vested in possession or enjoyment have a value capable of being definitely ascertained—'actual value' as expressed in Section 29, or 'clear value' as expressed in Section 30. The estate or interest here sought to be taxed was very clearly not of that character. While the right to receive the income was vested, it was a right the enjoyment of which, as with the legatee in Disston *v.* McClain, was contingent upon the beneficiaries living to receive it.

* * * * * * * *

"In using those terms ('actual' and 'clear' value) Congress must be deemed to have meant something more definite and certain than would be attached to the bald term 'value,' without the qualifying adjectives. A thing may have value in a general sense, although that value may not be susceptible of ready or definite ascertainment. It may depend upon some uncertainty or contingency. So that, when Congress employed the expressions 'ac-

tual value' and 'clear value,' it very evidently intended to convey the idea of definite or certain value—something in no sense speculative. Here it is at once apparent that the result reached as a basis for the tax through the method adopted was at most an approximation or merely speculative; and it could be nothing else. Life or annuity tables are never employed to ascertain definite or actual results, but only as guides to a reasonable approximation. Vicksburg, etc., R. R. Co. vs. Putnam, 118 U. S., 545, 7 Sup. Ct. 1, 30 L. Ed., 257, and cases there cited." (pp. 166, 167.)

At the conclusion of its opinion the court states:

"Without pursuing the analogies further, we are satisfied that in no essential particular are the rights of the legatees involved in this case to be distinguished in their legal aspects from those involved in Disston vs. McClain, and that, in accord with the conclusion reached in that case, it must be held that the only interest these legatees received under the will of the testator which could properly have been subjected to taxation under the act in question was the amount of income actually received and enjoyed prior to the date when the repeal of the act took effect; and, as that sum as to no one of them reached the amount of $10,000, there was nothing to which the tax could attach." (p. 168.)

The second sentence of the Refunding Act does not pertain to refundments but relates solely to the taxing statute in that it forbids the assessment of a tax on "any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment" prior to July 1, 1902. In the Lynch case both the Circuit Court and the Circuit Court of Appeals held this sentence prohibited the taxation of all income payments accruing sub-

sequent to that date. The taxes to be refunded by the first sentence are the same as those prohibited by the second sentence. This court so held in the Vanderbilt case, saying:

> "It is, we think, incontrovertible that the taxes which the third section of the act of 1902 directs to be refunded and those which it forbids the collection of in the future are one and the same in their nature. Any other view would destroy the unity of the section and cause its provisions to produce inexplicable conflict. From this it results that the taxes which are directed in the first sentence to be refunded because they had been wrongfully collected on contingent beneficial interests which had not become *vested* prior to July 1, 1902, were taxes levied on such beneficial interests as had not become *vested in possession or enjoyment* prior to the date named, within the intendment of the subsequent sentence. In other words, the statute provided for the refunding of taxes collected under the circumstances stated and at the same time forbade like collections in the future" (p. 500).

The Circuit Court of Appeals in the Lynch case says of the opinion of this court in the Vanderbilt case "It is further said, *in discussing the effect of the refunding act*" (Italics are ours) (164 Fed. Rep. 161, 165). This is immediately followed by a quotation from the opinion, including that given above; thus showing reliance upon the holding of this court in the Vanderbilt case in respect of the Refunding Act. Both the Circuit Court and Circuit Court of Appeals also held in the Lynch case that income payments accruing subsequent to July 1, 1902, were not authorized by the taxing statute.

The holdings of the two courts in the Lynch case in respect of taxes on income being unauthorized

both under the Refunding Act and Taxing Statute, is but a reaffirmance of what was said by this Court in the Vanderbilt case, in regard to the former act being declaratory of the latter. This position is in full accord with the action of the Treasury Department after the decisions in the Vanderbilt and Disston cases in refunding taxes upon remainders and annuities under the Refunding Act.

In the briefs in support of motions for certiorari in the Disston and Lynch cases the Department of Justice fully set forth the consequences of a denial of the motions. As has been heretofore shown the motions were denied. As a result of such denials, taxes collected upon annuity payments deferred until subsequent to July 1, 1902, have been refunded and further the Acting Attorney-General advised the Secretary of the Treasury of his acquiescence in the principle of the Lynch case and that taxes collected on all income payments not due until after the repeal of the law, as in the case at bar, should be forthwith returned under the authority of the Refunding Act. This advice was not followed by the Treasury Department. (Motion to Dismiss or Affirm, Appendix, A. p. 18.)

It is interesting to observe in this connection that previous to the decision in Knowlton *v.* Moore (178 U. S. 41), which reversed the prior practice of the Treasury Department, the Attorney-General, in an opinion dated January 5, 1899, advised the Secretary of the Treasury exactly in accordance with the decision subsequently rendered in Knowlton *v.* Moore. The Attorney General there stated:

> "I hold, therefore, that it is the purpose of the law under consideration not to levy a tax

> upon the gross amount of estates in the hands of executors, administrators, etc., but to tax such legacies and distributive shares arising from personal property as exceed $10,000 in actual value. The tax is upon the legacy or distributive share, not upon the estate." (22 Op. Atty.-Genl. 298, 301.)

There is no hiatus in the Refunding Act. Unless the interest upon which the tax was collected was "absolutely vested in possession or enjoyment" during the existence of the law, it was a "contingent" interest within the meaning of that Act. As has been shown, a technical or narrow construction of the Refunding Act no longer prevails.

It is exact to say that one "enjoys" the income he actually receives; it is not exact to say one "enjoys" the income he *expects* to receive. The words in the Refunding Act directing the return of "*so much* of said tax" etc., is in harmony with the above and clearly authorizes the retention of the tax on income actually received prior to July 1, 1902 (provided it amounted to $10,000) and commands the refundment of the balance.

From what has been heretofore shown, we submit, it irresistibly follows there can be no legal distinction in regard to the taxation of, or the refundment of taxes collected upon remainders, annuities or incomes accruing subsequent to the repeal of the law. All such taxes were clearly directed to be refunded by the Act of June 27, 1902.

III.

The collection of taxes on account of instalments of income which it was assumed Mary Wadleigh Stokes would receive subsequent to July 1, 1902, was unauthorized by the Taxing Statute.

(a) *The Act only taxed the clear and actual value of that which actually passed to the legatee or distributee.*

The fact that the Refunding Act is declaratory of the Taxing Act indicates that the former declared that under the latter certain legacies and distributive shares were not lawfully taxable and if taxed the moneys so collected should be forthwith refunded. This naturally leads to the inquiry as to whether the taxes here involved were authorized by the Taxing Statute, although our relief under the Refunding Act is due regardless of the legality or illegality of the taxes levied.

The material portions of Section 29 of the taxing statute are as follows (30 Stats. 448):

> "That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain,

sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First.—Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second.—Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed, as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died posesssed, as aforesaid, at the rate of

four dollars for each and every hundred dollars of the clear value of such interest.

Fifth.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided,* That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty."

We call the Court's attention to the words "beneficial interest" appearing in each of the five numbered paragraphs and which as there used clearly refer not only to legacies and distributive shares but also to personal property passing by deed, grant, bargain, sale or gift to take effect in possession or enjoyment after death.

As heretofore mentioned (Point II, subhead b), the words "beneficial interest" appear in the Refunding Act and there apply to legacies and distributive shares.

The leading case of Knowlton v. Moore, 178 U. S. 41, has only an indirect bearing on this case. In speaking of the questions there under consideration this Court in its opinion in Vanderbilt v. Eidman said:

> "Whilst that case involved the constitutionality of the act of Congress, with whose meaning we are here concerned, it required a construction of that act only to the extent necessary to enable it to be decided what was the

> subject upon which the law levied the tax, and whether the statute required the tax levied to be progressively increased by reference to the whole amount of the estate of the decendent, or alone by reference to the particular legacy or distributive share upon the right to succeed to which the tax bore. The case did not, therefore, pass on the controversies here arising." (196 U. S., 489).

The statement in the above quoted sentence

> "* * * it required a construction of that act only to the extent necessary to enable it to be decided what was the subject upon which the law levied the tax, * * *"

clearly refers to the holding of this court that the tax was upon the particular legacies or distributive shares and not upon the entire estate. In other words, that it was a legacy tax as distinguished from a probate duty.

A careful examination of the text of sections 29 and 30 of the Taxing Statute and of the Refunding Act, discloses the absence of an intention on the part of Congress to tax other than the clear and actual value of the property actually passing to the legatee or distributee.

In section 29 the expression "personal property or interest therein" corresponds to the expression "arising from personal property" which is used earlier in the same sentence. These expressions do not respectively mean *all* legacies or distributive shares arising from personal property nor *all* interests in personal property passing by deed etc. There are qualifications upon each of them; for example they must be over $10,000 in "actual" and "clear" value (Knowlton *v.* Moore, *supra*) and they must take effect in possession or enjoyment. (Vanderbilt *v.* Eidman, *supra*).

This section says " * * * where the whole amount of such *personal property* * * *." The expression "amount of personal property" could not properly be used to embrace the estimated and calculated value of rights and chances of getting something. The sentence says the *amount* of personal property *passing*. This is perfectly clear, and yet the sentence is even more explicit. It says where it (the amount) " * * * shall exceed the *sum* of ten thousand dollars in *actual* value, passing, after the passage of this Act", etc.

Here it is placed upon a money basis—Congress uses the words "amount," "sum", "dollars" and "actual value"—and in each of the following five numbered paragraphs the statute says "clear value." By no possible process of construction can these words be held to mean estimated and calculated values of chances or rights depending for their realization upon the continuation or cessation of a life or upon any future event.

The expressions "amount or value of said property" and "sum or value" used in the section embrace money and personal property and are in harmony with the other provisions of the section in regard to the actual and clear value passing after the passage of the act.

While the words "property" and "personal property" in their broadest sense would include all property of every kind or all property not real, it is we submit perfectly apparent the words are not so used but that the intention of Congress to include only tangible property actually passing is clearly disclosed in this section and in Section 30. For example by section 30 every executor, administrator or trustee before "*payment and distribution*" to the legatees, etc. is required to pay

the tax. Only money is "paid" and only tangible property is "distributed." Again—In the return to be filed with the collector it is required that it shall show, "* * * the *amount* of such legacy or distributive share * * *." And further the provision of this section requiring that any tax paid under the Act "* * * shall be deducted from the particular legacy or distributive share on account of which the same is charged" is quite conclusive.

A compliance with this latter provision, and an exaction of tax upon expected income would in many instances deprive the legatee of all income for several years. This is shown in the Disston and Lynch cases—a result surely not contemplated by Congress in the enforcement of this temporary tax measure. Indeed, the case at bar also shows such a result. Mary Wadleigh Stokes received in income between March 16, 1899 and July 1, 1902, $17,027.59. (Rec. 32) equivalent to an average quarterly payment of $1,309.81. *Out* of the first of such quarterly payments how could appellee, as executor, deduct $5,600.90 the tax it was obliged to pay? The tax must be paid *out* of the legacy. Clearly the legatee is entitled only to what remains after the payment of the tax. The provisions of the statute previously alluded to clearly show it was expected *something* would remain to pass to the legatee after the tax was "deducted" from the "particular legacy."

In the estates concerned in the cases of Knowlton v. Moore, *supra*, and in Vanderbilt v. Eidman, *supra*, incomes had been taxed and presumably upon their calculated present worths. But in neither of these cases was the question as to the legality or refundment of such taxes raised—in

fact the question was not and could not have been presented in either of them. We have heretofore pointed out what this Court said in regard to the questions with which it was concerned in Knowlton *v.* Moore. In the Vanderbilt case a tax of over one hundred thousand dollars had been *voluntarily* paid upon the right which Alfred G. Vanderbilt had, if he lived, of receiving the income from the estate until he attained the age of 30 years. This tax was not and could not, under the taxing law, have been sued for. The opinion of this court was very carefully analyzed on this very point in the case of Disston v. McClain (147 Fed. Rep. 114) heretofore mentioned.

Judge Gray in writing the unanimous opinion of the Circuit Court of Appeals for the third circuit said:

> "It will thus be seen that, in the questions submitted to the Supreme Court, there is excluded, by express language, any consideration of the right to appraise and levy a tax upon the value of the right to receive the income of the entire personal estate of the testator, for the period named. Mr. Justice White, in delivering the opinion of the court, said that the fundamental consideration involved in the questions was whether the burden imposed by the war revenue act 'bore upon the right to the residue which Alfred G. Vanderbilt might possess or enjoy in the future if he lived to the age specified in the will, upon the theory that the right so to possess or enjoy in the future was technically vested' " (147 Fed. Rep., 120).

On the same page it is stated (italics are ours):

> "But we repeat that the question as to the propriety of this voluntarily paid tax was not,

> and could not have been, before the court, nor do we think that, in stating the question to be whether the tax was to be confined to that which had been voluntarily paid and could not be a subject of suit, or was to include that also which was paid under protest, and for which alone suit was brought, the learned justice can be taken to have conceded the legality of the former. *On the contrary, the reasoning by which the illegality of the protested tax is demonstrated, tends largely to show the illegality of the tax voluntarily paid.*"

The fact that the question was not and could not have been in issue in these cases is decisive and completely negatives any effect sought to be obtained from general expressions found in either of them. As the late lamented Chief Justice said in speaking for the Court in the case of Harriman *v.* Northern Securities Co. (197 U. S., 244, 291):

> "This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits, Cohens *v.* Virginia, 6 Wheat 264, 399; Caroll *v.* Caroll's Lessees, 16 How. 275."

(b.) *The use of Mortuary Tables and of an assumed rate of interest were both unauthorized by the Taxing Statute.*

The absence from the statute of any expressions concerning the taxation of the calculated values of expected incomes is very persuasive of the absence of the intention to tax them. The same observation is applicable in regard to an arbitrarily assumed rate of interest and arbitrarily

selected mortuary tables, each of which was necessarily used in arriving at the calculated and estimated values which was placed upon the chance or expectancy of receiving an estimated income during an estimated period of years.

As was said by Judge Gray in the case of Disston *v.* McClain, *supra*:

> "The sum thus arbitrarily estimated, the collector assumes the right of appraising as a legacy of a life estate in personal property, the present value of which, for the purposes of taxation, is to be ascertained by rules and methods not designated in the taxing law, nor as we think, authorized or contemplated thereby" (147 Fed. Rep. 117-8).

The Circuit Court of Appeals for the Third Circuit in the case of Herold *v.* Shanley (146 Fed. Rep., 20, 24) said:

> "It may be added, however, that the method of calculation adopted by the Collector was also objectionable because * * * the value of the residuary estate bequeathed to the sons was estimated by the use of mortuary tables, for which use we fail to find any authority is the statute."

See also Kahn *v.* Herold (147 Fed. Rep., 575, 582), in which it appeared that a life, which according to the tables should continue for some thirty years, actually terminated before the tax assessed by the use of such tables had been collected.

The Commissioner of Internal Revenue assumed in the calculations that Mary Wadleigh Stokes would each year receive exactly *four* per cent interest from the residuary estate, the income from which was bequeathed her by Tilden's will—(Rec.

31 Finding V). To have assumed five per cent as the value of money would have added twenty-five per cent. to the amount of the tax; to have assumed eight per cent. would have doubled it. Surely such an assumption, bearing as it did directly upon the rate of taxation and the amount of taxes collected, was purely legislative in character.

In the case of Interstate Commerce Commission *v.* Railway Co. (167 U. S., 479), it was insisted on behalf of the Commission that power had been conferred upon it by the Interstate Commerce Act to fix rates. Mr. Justice Brewer, in speaking for the Court, significantly remarked in the early part of the opinion (p. 494):

> "The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not."

Again (same page):

> "The grant of such a power is never to be implied."

The opinion further states (p. 501):

> "The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

Summing up the reasons which convinced the Court that there was no power granted the Commission to prescribe rates, the Court on page 505 said:

> "The words and phrases efficacious to make such a delegation of power are well un-

derstood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."

The above is directly in point. The Court further said (p. 510):

> "Still again, it is urged that the Commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it."

As was said by the court in Tillson *v.* United States (100 U. S., 43, 46):

> "But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

See also

United States *v.* Chase (135 U. S., 255, 259).

Vicksburg, etc., R. R. *v.* Dennis (116 U. S., 665, 669, 670).

The opinion in Interstate Commerce Commission *v.* Railway Co. (*supra*) contrasts the act of Congress, from which it was sought to imply the power to fix rates, with the provisions of state statutes where such power had been expressly

conferred. The reasoning there is analogous to that which prompted Judge Gray in Disston *v.* McClain (*supra*) to remark that had Congress intended to tax such interests such intention would not be left to inference " . . . but would be clearly expressed and a mode of estimating such an interest would be prescribed, as, for example, has been done in the collateral inheritance tax laws of the state of New York and New Jersey." (147 Fed. Rep., 122).

In many of the states there are inheritance tax laws and they form a part of the permanent tax legislation.

We quote the following provisions of the state statutes showing enactments in express terms for the taxation and valuation of remainder interests, annuities, life estates, etc.

> "The value of every future or contingent or limited estate, income, or interest shall, for the purposes of this Act, be determined by the rule, method, and standards of mortality and of value that are set forth in the Actuaries' combined experience tables of mortality for ascertaining the value of policies of life insurance and annuites, and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall [illegible]ve per centum per annum."
>
> Statutes of California, 1893, p. 196.

> "The value of any estate and property described in Sections 1470 and 1471 of the Code subject to the collateral inheritance tax shall be determined for the purpose of computing said tax by the rule or standards of mortal-

ity and of value commonly used in Actuaries' combined experience tables. * * * The taxable value of life or term, deferred or future, estates shall be computed at the rate of four per cent. interest." Laws of Iowa, 28th Gen'l Assembly, p. 36, Sec. 7.

"The value of an annuity or a life interest in any such property, or any interest therein less than an absolute interest, shall be determined by the 'American Experience Tables' at four per cent. compound interest." (Acts, Massachusetts, 1909, Ch. 527, Sec. 3.)

"The value of every future, or contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies; except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum." Laws of New York 1896 Vol. 1, p. 874, Sec. 230.

In the several other states in which inheritance tax laws are in force and the right to income is taxed, enactments of the character quoted above will be found, or other provisions expressly designating the methods to be used in the ascertaining of such values.

The arbitrary assumptions, under the Spanish War Act, as to mortuary tables, rate of interest, etc., were resorted to in but three classes of cases viz:

1st. Remainders;

2nd. Annuities for life or for years;

3rd. Income for life or for years.

The two first, as we have shown, have been eliminated and refundments have been made in each of such cases under the Refunding Act. Similar action as to the third class, which we are now seeking, will not only remove the last vestage of these encumbrances and leave the taxing statute plain and unambiguous—a law under which definite rates of taxation, fixed by Congress, attach uniformly as the act declares to "clear" and "actual" not estimated nor speculative values, but will also give effect to the Refunding Act fully in accordance with its object and purpose.

Recalling to the Court's attention the illustration given under the preceding title, subhead (c,) of an annuity to a son and the income from $100,000 to a daughter and the inequality and manifest injustice resulting from such an interpretation of the Refunding Act, we quote the following from the opinion of this Court in Knowlton *v.* Moore (178 U. S. 41, 71):

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

The purpose of Congress, as shown above, to tax only what was actually received during the existence of the tax law is confirmed by the fact that it was a war measure to be only temporarily in force.

In the report of the Ways and Means Committee of February 3, 1902, on the "Repeal of War Taxation" it is stated:

"It was understood at the time of the passage of this act that it was purely a war measure, and that it would be repealed as soon as the war was over and the increased expense growing out of the war should cease." (H. R. Rep. No. 320, 57th Cong. 1st Sess. p. 1).

It is clear, we submit, it was the intention of Congress, during the existence of this emergency, to exact from those who actually received something, as a result of death, a part thereof to help the Government meet these temporarily heavy charges.

Such laws, in this country have always been of a temporary character.

(c.) *The History of Death Duty legislation in this country confirms the foregoing propositions.*

The first inheritance tax law was the Act of July 6, 1797 (1 Stats. 327) by which a stamp duty was imposed upon the receipt given for a legacy or share of an estate. It was a "legacy" tax and was graded upon the amount actually received (Sec. 6). It was repealed on June 30, 1802 (2 Stats. 148).

The general history of death duty legislation, both in this and in foreign countries, is so lucidly set forth in the opinion in Knowlton *v.* Moore, (178 U. S. 41, 47-58) that no purpose would be served by an attempted repetition. Suffice to say, the Civil War Act of July 1, 1862, (12 Stats. 433, 485) also imposed a legacy tax. It was amended and reenacted by the Act of July 30, 1864 (13 Stats. 223, 285) and further amended on July 13, 1866 (14 Stats. 98, 140). Although there

were other death duties embraced in the Civil War legislation the legacy tax remained. By Act of July 14, 1870 (16 Stats. 256) which took effect October 1, 1870, the Act of 1864 and amendments were repealed. So too, in the Act of June 13, 1898 the legacy tax is found in almost the same words as the Act of 1864.

Section 29 of the Act of 1898 down to and inclusive of the fifth numbered paragraph, is identical in terms with section 124 of the Act of 1864 with the exception that the minimum amount taxable under the former Act is $10,000 and in the latter Act $1,000. Section 30 of the Act of 1898 is an exact reproduction of section 125 of the act of 1864. The identity of the Acts of 1864 and 1898 is adverted to in the opinion in Knowlton *v.* Moore (178 U. S. 41, 69).

The Act of June 13, 1898 was amended by Act of March 2, 1901 (31 Stats. 946). These amendments are practically the same as the amendments made in 1866 by the Act of 1864.

It thus appears that on the three occasions when death duty statutes have been temporarily in force the legacy tax is to be found—a tax upon what was *received,* as a result of death.

By Act approved April 12, 1902 (32 Stats. 96) the taxing statute of June 13, 1898 and amendments were repealed to take effect July 1, 1902. Section 30, however, was continued in force as to all taxes "imposed" by section 29 prior to July 1, 1902. As held in Hertz v. Woodman, (218 U. S. 205), the tax was "imposed" as of the date of death, but not due nor measurable nor collectible until later, as prescribed by the Act. An estate might prove to be insolvent and hence no tax would be due although the right accrued to

the Government, upon death, to collect the tax should it subsequently transpire that the estate was liable therefor.

The Refunding Act was in harmony with both the taxing and repealing acts. In cases of income, upon the death of the testator the Government's right to the tax immediately accrued but it was to be subsequently measured by the amount received and to this extent only. Taxes collected upon any other sums either real or estimated were not only unauthorized by the Taxing Statute but directed to be refunded by the Refunding Act.

IV.

Notes on brief on behalf of appellant.

The first point in the brief on behalf of appellants rests upon a technical interpretation of the Refunding Act. At page 8 counsel sets forth Bouvier's definition of a "contingent interest in personal property". It obviously has no place in this case. In the Vanderbilt case, the Court said, quoting with approval from the Matter of Hoffman, 143 N. Y., 327:

> "We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates, although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of

> its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership." (196 U. S., 495, 496).

Both this court and the New York Court of Appeals adopted the latter method and brushed aside the technical rules of construction. The position of counsel in regard to technically contingent interests is the same as that of Acting Attorney-General Beck in his opinion of August 1, 1902 (24 Op. Atty. Gen'l. 98) which was overturned by Vanderbilt v. Eidman (196 U. S., 480). See also 26 Op. Atty. Gen'l 195.

As heretofore noted, this Court, in its opinion in the Vanderbilt case, after setting forth in full the Refunding Act and saying it was in a sense declaratory of the Taxing Statute, concluded by holding it was unnecessary to determine whether the interest of Alfred G. Vanderbilt was "technically a vested remainder" as the same was not taxable, because the period of possession or enjoyment had not arrived during the life of the law.

It is obvious, therefore, that counsel's first point (and the other points depend upon the first) is opposed to the holding of this court in the Vanderbilt case. See also Point I, this brief.

The second point in appellant's brief deals with the history of the Refunding Act and quotes certain isolated remarks in the opinion in the Vanderbilt case in regard to the tax on income which was voluntarily paid and not sued for. In the first place such remarks are *dicta* as it must be borne in mind the court there was only concerned with remainder interests and secondly, as ably stated by Judge Gray, in Disston v. McClain, after an exhaustive analysis of the opinion in the Van-

derbilt case, "*On the contrary, the reasoning by which the legality of the protested tax is demonstrated, tends largely to show the illegality of the tax voluntarily paid.*" (147 Fed. Rep., 114, 120).

Counsel relies largely upon remarks made by Mr. Payne in relation to the Refunding Act (Brief p. 14) and refers to three cases to support his position that such remarks are evidence.

The opinion in the American Net and Twine Co. v. Worthington (141 U. S., 468, 473, 474), the first case relied upon, expressly points out that statements and opinions advanced by the promoters of an Act are not evidence. Holy Trinity Church *v.* United States (143 U. S., 457, 463) goes no further than to state the recognized rule as to evidence concerning the history of the times being admissible. The third case, Dunlap v. United States (173 U. S., 65, 75), likewise fails to support counsel's position. While the Court said it was "*interesting*" to note from the Congressional Record that in Congress efforts had been made to amend the bill, etc., this was, said in the words of the Court, "Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body." (173 U. S., 75).

There is wholly lacking authority for the proposition that Mr. Payne's statements are evidence.

The decisions of this court recognize the rule that where a bill has been referred to a committee its report thereon may be examined. Such reports are printed, are prepared with care and set forth fully the views and objects of the committee in relation to the proposed legislation. They are often accompanied by the views of the minority.

In the instance under consideration, as shown by Mr. Payne's remarks as quoted, there could not have been a committee report *because the bill with this amendment was never referred to the Ways and Means Committee.* The matter was as Mr. Payne states, considered "*informally,* of course." Such remarks are, therefore, clearly outside of the rule which permits only formal and regular Committee Reports to be received as evidence. United States v. Freight Association (166 U. S., 290, 318).

But even though the remarks were evidence, they would not in any wise conflict with the contentions of appellee. Mr. Payne's remarks do not claim to cover *all* of the objects of the amendment and it is obvious from the express terms of the Act that they do not. Undoubtedly the Finance Committee of the Senate, which had the amendment regularly before it, considered the full effect of the Refunding Act and saw that the language used expressed the desired intention, viz, to refund so much of all sums collected as taxes upon legacies or distributive shares which were not absolutely vested in possession or enjoyment prior to July 1, 1902.

The third point in counsel's brief rests on the proposition that the interest of Mary Wadleigh Stokes is technically not a contingent interest. We have heretofore shown this court has rejected this contention.

In the discussion of the fourth point counsel quotes the first paragraph of section 29 of the taxing act and italicizes the word "trust." There is no particular significance in this word and it is properly in the statute. Trust estates were taxable, of course, whenever the right to possess or

enjoy accrued during the existence of the law and to that extent only.

The brief is silent upon the various actions heretofore shown in regard to the taxation and refundment of taxes on remainders and annuities, under the Refunding Act. We are unable to discern whether or not counsel is in accord with the Disston case from his references thereto at the bottom of page 36.

Counsel relies upon the departmental interpretation of the Taxing Statute of 1898 and of that of 1864, but makes no references to the uniform interpretation by the Department of the Refunding Act which as heretofore shown is clearly entitled to greater consideration.

The Act of 1864 had been repealed twenty-eight years when the Act of 1898 was passed. Not only did the draftsman of the latter ignore the judicial interpretation of the former (Mason v. Sargent, 104 U. S., 689, and Vanderbilt v. Eidman, 196 U. S., 480, being essentially the same), but he also ignored the amendatory Act of 1866. "..... the fair inference being that the writer of the present act (Act of 1898) had before him the original text of the act of 1864, *and not that text as amended by the act of 1866.*" Knowlton *v.* Moore (178 U. S., 41, 69). Can it be presumed therefore the draftsman was nevertheless acquainted with the departmental interpretation of the Act of 1864 when he ignored both its legislative and judicial history?

But further, a departmental interpretation which was only in existence six or possibly eight years and ceased 28 years prior to the enactment of the new law is not, under the decisions, entitled to the consideration for which counsel contends.

As said by this court in Merritt *vs.* Cameron, 137 U. S. 542, 551, 552;

> "A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country unless such construction had been continuously in force for a long time. The cases cited go to that extent and no further."

There could never be a successful case for the recovery of taxes if the rule in regard to the effect of departmental interpretation, as contended for by counsel, were adopted.

It is interesting in this connection to observe that this court in Knowlton *v.* Moore *supra,* held the departmental construction of the legacy tax act of 1864 was wrong and it also there held a similar departmental construction of the act of 1898 was likewise wrong.

Counsel on page 24 relies upon the construction of the Taxing Statute which he asserts has been "consistently maintained by the executive officers" during the existence of the law. We have shown that in two respects the present administrative construction of the Refunding Act, which has been consistently adhered to for over six years in the case of remainders and for nearly four years in the case of annuities, is a repudiation of the Department's prior construction of the Taxing Statute.

The Secretary of the Treasury has, during the periods above mentioned, uniformly refunded such taxes under the authority conferred upon him by the Refunding Act. There remains only the tax on incomes as in the case at bar and we

have shown not only that there is no distinction in principle between the refundment of such taxes and those on remainders and annuities but also that the chief Law Officer of the Government has advised the custodian of its funds that it was his duty to make such refundments.

The other points relied upon in appellant's brief are fully covered in this brief.

V.

Conclusion.

We submit that there can be no legal distinction, under either the Taxing Statute or Refunding Act, between remainders, annuities and income payments accruing subsequent to July 1, 1902, and that the purpose of the Refunding Act is to return all sums collected as taxes upon personal property or money, which under the terms of wills, or intestate laws, was not capable of being "absolutely vested in possession or enjoyment prior to said July first nineteen hundred and two." The income payments which Mary Wadleigh Stokes has received since that date as well as the payments which she *may* receive in the future do not fall within that classification.

Appellee is, therefore, entitled to an affirmance of the judgment.

Respectfully submitted,

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Counsel for Appellee.

APPENDIX.

Brief Review of Cases.

The cases here reviewed as well as those cited in the brief, outside of the decisions of this Court, are not assumed to be binding authorities, and may be considered as academic, having no other force than such guidance as that reasoning may offer.

The case of *Westhus* v. *Union Trust Co., 164 Fed. Rep. 795* is first in order, as it was relied upon by Government counsel in the Court of Claims to offset the decision in *Disston* v. *McClain* and *Union Trust Co.* v. *Lynch,* which had held as exempt from taxation annuities and legacies of income beyond the amounts which beneficiaries were entitled to receive up to the 1st of July, 1902, the date of the repeal of the Tax Law.

The main question in this case was several times brought before this Court, and finally settled in *Hertz* v. *Woodman, 218 U. S., 205,* whether the saving clause in the Repealing Act of April 12, 1902, as to all taxes imposed prior to July 1, 1902, was affected by the amendment of 1901 to the original Tax Act, declaring "that the tax or duty shall be due and payable in one year after the death of the testator;" testator having died December 11, 1901, the tax, therefore, not becoming due until December 11, 1902. The Court held that the estate was created, and the right of the legatee came into being on the death of the testator, and the tax was imposed as of that date.

The Court also decided that the right of the legatee to the income of a fund was absolutely vested at the death of the testator. But the question

in the case at bar as to the value of such interest, subject to taxation, whether such value went beyond the amount of income which the legatee was entitled to the enjoyment and possession of prior to the first of July, 1902, and whether the Collector had a right by recourse to mortality tables and the arbitrary assumption of a definite rate of interest to estimate the probable duration and amount of the legatee's receipt of income during the estimated term of his life, and tax the gross amount thus reached, as a present beneficial interest, were not passed upon by the Court.

The Court had insisted that the delays of judicial administration, payment of debts, preparation of schedules, etc. had postponed the actual enjoyment of the income, and on this the Court said:—

> "The effect of restrictions of that character would be upon the value of the interest which the legatees secured, and *concerning that there is no controversy here.*

Herold v. *Kahn, 159 Fed. Rep. 608.*

Under the Will of Abraham Wolff, who died October 1, 1900, his estate was placed in trust for his daughters, the income to be given to the daughters during life, with power of disposition by Will. Wolff's executors made their returns to the Internal Revenue Collector showing the amount of the testator's residuary estate at $5,295,537.94, and stating the valuation of one-half of said residuary estate trusteed for the benefit of the daughter, Mrs Wertheim at $2,647,768.97. A further return was asked for, and correspondence and interviews were had between the attor-

neys and the tax authorities, without reaching any definite conclusion as to what further was required until October 26, 1903, when the executors received a notice from the Collector that a tax of $107,398.16 had been assessed against them as a tax upon legacies and distributive shares and demanding payment with threat of collection adding interest and penalty. The tax was paid under protest that it was illegally assessed "so far as includes a tax on the life interests created by said Will."

Clara Wertheim the life beneficiary of the estate here in question died before the receipt of said notice, to wit, the 15th day of August, 1903, 2 years 10 months and 14 days after the death of the testator, and a petition was made for the reimbursement of the excess taxation, amounting to $37,673.13.

The Collector contended that the tax was properly assessed as on the valuation of the life estate, computed from the day of the death of the testator according to the life tables adopted and used by the Internal Revenue Department. (P. 611).

No question was made that, under the provision of Wolff's Will, Mrs. Wertheim had a beneficial interest in the corpus of the fund or estate, the income of which she was to enjoy during her life.

The Commissioner assessed the clear value of Mrs. Wertheim's life interest in one-half of the residuary estate of $2,647,768.97 at the sum of $1,870,367.08, computing Mrs. Wertheim's probable duration of life according to the life tables. Although the Spanish War Revenue Act does not prescribe or authorize such a method of assessment, it was claimed that § 31 of the Act makes all administrative, special or stamp provisions of

law, not specifically repealed, applicable to said Act, and that under § 3447 U. S. Rev. Stat. the Commissioner had the right to prescribe a mode of assessing the taxes and resorting to mortuary tables for the purpose of ascertaining the present value of the life interest.

The Court says:

> "We may assume for present purposes that this contention, etc., is correct, but it does not follow that such tables can be resorted to or used to ascertain a life expectancy when the period of that life has already been determined * * *. The life in question had already determined, and its precise duration as a basis of valuation was fixed." (P. 614.)

In answer to the contention that as the statute provided that the tax should be due and payable in one year after the death of the testator, and be a lien upon his property from that date, the tax whenever imposed related to that time, the Circuit Court of Appeals says:

> "The defendant contends that the interest of the deceased in the estate was subject to the tax from the time of the death of the testator, and that whenever imposed the tax related back to that time; nevertheless the clear value of each interest had to be ascertained, and as the interest to be assessed in this case was a life interest, and its value depended upon the duration of a life, such duration had to be determined, and it was just here that the mistake was made; it would hardly be pretended in reason, that if the life tenant had died the day after her father, that a tax, the amount of which had been thereafter determined by the use of mortality tables, would be legal even though it be ad-

mitted that such tax rightly imposed would relate back to the death of the parent. The duration of life in the case supposed, would have been determined and the value of the life interest ascertained by its known duration. Each interest liable to taxation must be valued independently. (Knowlton *v.* Moore, 178 U. S., 41.) As already said, life tables are not the best evidence or conclusive evidence, their use is only justified when no better evidence is obtainable." (Pp. 614-15.)

NOTE:—The sound reasoning of the opinion quoted above is applicable to the cessation of the tax by the repeal of the law quite as much as by the death of the life tenant.

Shanley v. *Herold, 141 Fed. Rep. 423.*

In this case CROSS, District Judge, held that a bequest under the Will of Bernard M. Shanley of $100,000 to his executor, in trust to "expend the income thereof for the support, maintenance and education of my grandson Joseph S. Shanley, until he shall arrive at the age of twenty-one years, when the said sum of $100,000 shall be his and shall be paid to him accordingly," was not taxable as to the principal, being contingent upon the legatee living to the age of twenty-one years, but that, notwithstanding, "the legatee had a present beneficial interest in the legacy which was taxable," to wit, the income to be paid him until he reached the age of twenty-one years.

The Court says:

"At the death of the testator he was 7 (seven) years of age, and he had a life expectancy of nearly forty years. The trustee who held the legacy was directed to expend the income thereof for his support, main-

> tenance and education until he should arrive at the age of 21 years, and, since his life expectancy extended beyond that period, he would seem to have, and to be in the possession and the enjoyment of, a *present* beneficial interest in said fund *for the period of 14 years,* being the difference between his age at the death of the testator and the time when he would reach the age of 21. We estimate the total taxable value of the legacy therefore at $42,252.48."

This reasoning which regards the principal of the legacy as contingent, because the right of the legatee to possess it will depend upon his living to the age of twenty-one years, and yet considers the right to the income until he reaches that identical age, as "a present beneficial interest in said fund for the period of 14 years, being the difference between his age at the death of the testator and the time when he would reach the age of 21," seems to us self-contradictory on its face. The right to the income for a *future* period of 14 years is declared to be a *present* beneficial interest of the value of $42,252.48, for the sole reason, as stated in the opinion, that "at the death of the testator he [the legatee] was 7 years of age, and he had a life expectancy of nearly 40 years." If this life expectancy was a legal foundation for classifying as "a present beneficial interest" the right to an income during 14 years of future time, it was surely equally sufficient to make what the Court calls the contingency of receiving the principal of $100,000 at the end of the same 14 years, equally a "present beneficial interest."

No appeal was taken from the decision in this case by the executor but the Collector appealed therefrom with reference to other items of taxation which the Court disallowed.

This appeal is *Herold* v. *Shanley, 146 Fed. Rep. 20.*

The Court says:

> "The Circuit Court allowed certain claims of the Collector which are not now before us, as no writ of error has been taken by the executor to such allowance" (p. 21).

The Court then holds that the legacy of $100,000 to Joseph when he arrives at the age of 21 is a contingent legacy. With reference to certain other legacies to the children of the testator dividing the income of the residue of his estate between his wife and three sons "until the death or remarriage of my said wife, upon the happening of either of which events all her right, title and interest in my estate shall cease. And thereupon, I direct that all the rest, residue and remainder of my estate, real and personal, etc., shall be distributed and divided among my said three sons, share and share alike" (p. 21), the court also held them to be contingent and not taxable, adding:

> "It may be added, however, that the method of calculation adopted by the collector was also objectionable because it reduced the principal of the estate, and thus diminished the income of the widow, in effect taxing her without any authority for such taxation, and that the value of the residuary estate bequeathed to the sons was estimated by the use of mortuary tables, for which use we fail to find any authority in the statute" (p. 24).

Title Guarantee & Trust Co. v. *Ward, 164 Fed. Rep. 459.*

In this case McComb died March 31, 1901, and disposed of a portion of his residuary estate in trust for the benefit of four children, each to re-

ceive out of such estate an immediate income of $6,000 per annum until certain liens and mortgages were paid off, and then to divide the remaining income equally among such children or their issue or devisees, with the provision that in case the trust should terminate while any child was less than forty years of age, the executors, if the laws of New York permitted them to do so, were to defer the payment of one-half the principal share of any child under such age, so that the final payment should be made when the beneficiary attained such age. The Court held that:

> "*The absolute title of each share,* except mere possession of the principal and certain changes in the income, is given by the will to each child, respectively. *The child of the testator can dispose of the title thereto.* No other person can. Such child has and enjoys the income absolutely, subject to the interest of the widow and certain payments on liens on a part of the property. At common law the title and estate of each child is vested, not technically, but absolutely; not in possession, however, but no power or event, save the voluntary act of the child of the testator, can divest that title. *His or her death does not,* for in that event the title goes according to his will or deed, or according to the law in cases of intestacy, not under the will of McComb" (pp. 463, 464).
>
> "The absolute right to possess and enjoy the income, subject to certain charges, *and to dispose of the principal by will or otherwise,* attached immediately on the death of McComb, and the right to the possession of the principal is fixed at definite and certain times" (p. 464).
>
> "I am of opinion that when the estate is absolutely vested in ownership, with absolute right of disposition, and is accompanied

by the absolute right to enjoyment of the income, so far as given by the will, present possession or present right of possession of the property itself is unnecessary, and that such interest is presently taxable. I do not think that in this connection 'possession' means the same as 'enjoyment.' *If the gift of the principal is absolute,* then either possession thereof or the right to enjoy the income so far as given is all-sufficient. Neither the statute nor the language of the Supreme Court reads 'possession and enjoyment' but 'possession or enjoyment.' *If the personal property is absolutely given by will by an indefeasible title, and is accompanied by a present right to the possession and use of the income* so far as given by the will, possession of the principal for a limited time by the trustee does not defer the imposition and collection of the tax until the time for payment over." (P. 465.)

"The fact that payment over of the corpus of the estate is deferred, *if there be a present absolute gift thereof, accompanied by the present enjoyment of the income,* does not prevent the absolute vesting, and in such case there is no 'technical' vesting" (p. 467).

The above case was affirmed by the Circuit Court of Appeals, 184 Fed. Rep., P. 447. The Court there says:

"The present case is readily differentiated from those relied upon by plaintiffs *in the circumstance that the children of this testator are given their respective shares absolutely. They and they only have power to dispose, each of her share, having that power over the corpus,* and in the meantime the enjoyment of the income. They may fairly be held to have each a vested estate of which she has the enjoyment." (P. 449.)

The passages which we have underscored in this opinion, make plain the difference between that case and the case at bar. Present enjoyment of the income and power of disposition of the principal, constitute a property right of which the actual value may be readily ascertained, without recourse to the uncertain estimate of mortality tables, and is totally different from the mere right to receive the income in quarterly payments, conditioned upon the legatee's continued existence.

Ward v. *Sage, 185 Fed. Rep., 7.*

The tax had been imposed upon the interests of certain children in the residuary estate of the testator. The several children each had a right to the income of the share and to the corpus of it upon reaching a certain age. Testator died June 23rd, 1902, and the Will was admitted to probate July 9, 1902. Three of the children had reached the age designated in the Will for the delivery to them of the corpus of their respective shares; two had not reached that age.

The Court held that the bequests bequeathed to the children who had reached the designated age were theirs in enjoyment at the death of the testator, and were taxable. The fact that the tax was not payable under the amendment of §30 of the Revenue Act until one year after the death of the testator did not affect the tax which was imposed by law at the date of the testator's death.

Upon the point urged that upon the death of the testator, each of the children had a vested interest in the income of her share of the residuary and had a right to the enjoyment of such income, since it was wholly at her disposal, the

Court declined to pass, being advised by counsel for the Government that the same point was involved in a case upon the Supreme Court calendar.

Upon the question as to the character of the interest of the children to a certain share of the residue, which had been bequeathed to trustees for the widow during her life, the Court said:

> "Each had a vested remainder, not subject to being divested by any contingency; such interest was unquestionably vested in title, but it did not take effect in possession because the widow was living at the time of testator's death. No doubt each one, having an indefeasible interest, had the power to sell it and pass title; but, in view of the fact that possession could not be taken until after the indefinite period of the widow's life, it might be difficult to effect a sale. To the income accruing during that indefinite period, none of them had any right whatever. It is difficult to see how the gifts * * * took effect in enjoyment upon the testator's death."

This is in accord with the decision in Vanderbilt *v.* Eidman, which makes a distinction as to taxability upon a remainder technically vested, and one vested absolutely in possession or enjoyment.

The Court further says:

> "It may also be noted that, by imposing a tax of $2,984.27 on each of the five shares of the one-third residue which had to be paid out of the corpus of such residue, the amount set aside to provide a life income for the widow has been depleted to the extent of $11,937.08, and her income reduced by the yearly earnings of that sum." (P. 10.)

The Court also held that the gifts having taken effect in enjoyment upon the death of the testator, the fact of a postponement of the payment in the course of administration for one year after the granting of letters had no effect upon the taxability, the "enjoyment" being sufficient.

Mason v. *Sargent, 104 U. S. 689.*

Under the Civil War Tax Act of 1864 (Amended 1866 and repealed 1870), a tax was imposed (§ 124) upon legacies and distributive shares. By §125 this tax is declared to

> "be due and payable whenever the party in-
> "terested in such legacy or distributive share
> "or property or interest aforesaid shall be-
> "come entitled to the possession or enjoy-
> "ment thereof, or to the beneficial interests
> "in the profits accruing therefrom."

Legacies or distributive interests passing to husband or wife are exempt. Executors are required to pay the tax before payment of the legacy.

Mason died in 1867, leaving his property to his widow for life and on her death to his children. The widow died in 1872. The property was assessed and taxed on the ground that the tax accrued in 1867, on the death of the testator and was therefore taxed by the proviso in the Repealing Act.

Held that by the terms of the Amendment of 1866

> "the tax or duty becomes due and payable
> "only when the party interested in such
> "legacy &c., shall become entitled to the pos-
> "session or enjoyment thereof &c.
> "The subject of the tax is the interest of
> "the legatees in remainder; but it is not tax-

"able as a remainder for by the terms of the "law it does not become a subject of taxation "until the right accruing to reduce it to pos- "session" (p. 692).

Clapp v. *Mason. 94 U. S., 589.*

Under the same will as above, real estate was devised to the widow for life, or while she should occupy it as a residence. She occupied it until her death in 1872.: It was then assessed and taxed. The statute defined "succession" as the "devolution and title to any real estate" and imposed a tax upon the "successor to real estate" § 126, and by § 127 provided that any disposition by will and by reason whereof any person shall become beneficially entitled to possession or expectancy to any real estate or any interest therein upon the death of any person shall be deemed to confer a succession and § 137 provided "that the duty should be paid when the successor &c., shall become entitled in possession to his succession or to the receipt of the income or profits thereof."

The Court says:

"It is manifest that the right does not ac- "crue until the duty can be demanded, that is "when it is made payable; in other words, at "the end of thirty days after becoming enti- "tled to possession."

"The successor did not become entitled to "the possession or enjoyments of the estate "until the death of the widow, which occurred "on the 17th day of June, 1872. The duty im- "posed extended only to successions accruing "prior to Aug. 1, 1870. The saving clause "therefore does not reach the case."

Under the Tilden Will, Mrs. Stokes only "became entitled to the possession or enjoyment" of

the income of the residuary estate (to the extent of $17.027.51 up to the 1st of July, 1902, when the tax ceased. All the income after that date did not "become absolutely vested in possession or enjoyment" prior to July 1, 1902 (Rec. 32) and "so much of said tax as may have been collected on (those) contingent beneficial interests" the Secretary of the Treasury is by the terms of the Refunding Act §3 "directed to refund."

Measure of Tax.

In assessing a tax

> "upon a franchise * * * *a reference to "property is made only to ascertain the value "of the thing assessed."*
>
> Monroe Sav. Bk. *v.* Rochester, 37 N. Y. 365.
> quoted in Plummer *v.* Coler, 178 U. S. @ p. 123.

> "Such taxes are to be regarded as imposed, "not upon the property, *the amount of which "is referred to as regulating the amount of "the taxes,* but upon franchises and privi- "leges derived from the state."
>
> Plummer *v.* Coler, *supra,* at p. 125.

The

> "effect of this special tax is to take *from "the property a portion, or percentage of it, "for the use of the state."*
>
> Matter of Swift, 137 N. Y. 77.
> quoted in U. S. *v.* Perkins, 163 U. S. 625 and in
> Plummer *v.* Coler, 178 U. S. at p. 131.

The tax is imposed not on the bonds

> "but upon the privilege of acquiring prop-
> "erty by will or inheritance, and * * * the
> "tax may be assessed upon the basis of their
> "value."
>
> "In assessing a tax upon such right or
> "privilege the state may lawfully measure
> "or fix the amount of the tax by referring to
> "the value of the property passing."

Plummer *v.* Coler, *supra* at p. 134, citing

Wallace *v.* Myers, 38 Fed. Rep. 184.

Was there any power

> "to appraise and levy a tax upon the value
> "of the right to receive the income of the
> "entire personal estate of the testator for the
> "period named?"

Disston *v.* McClain, 167 Fed. Rep. 120.

NOTE. The tax must be confined to the right of the beneficiary to receive the income for the period during which the law subsists; to wit, until the 1st of July, 1902. The Refunding Act provides for the refund of the tax so far as it bore upon the right of the beneficiary beyond that date. It is of interest to note that the court conceded the Refunding Act to be declaratory of the intent of the Taxing Act, in other words, that the refund was ordered of such excess of tax as the Taxing Act had not intended to be levied. But even were this not so, the Refunding Act is of itself sufficient to indicate the excess of taxation which it remitted and ordered refunded.

Measure of Tax.

A state inheritance tax held valid even upon that portion of the estate consisting of United States bonds

> "upon the principle that what is called an in-
> "heritance tax *is a bonus, exacted from the*
> "*collateral kindred and others, as the con-*
> "*ditions on which they may be admitted to*
> "*take the estate left by a deceased relative*
> "*or testator.*"
>
> Plummer *v.* Coler, 178 U. S. at p. 121, quoting from:
> Strode *v.* Commonwealth, 52 Penn. St. 181.
> Clymer *v.* Commonwealth, 52 Penn. St. 181, 185.

No power to estimate life or fix rate of interest.

As to fixing the rate of interest on capital, this is an arbitrary assumption, even more devoid of foundation than the estimate of continued life, which itself is only resorted to as the best approximation where certainty is impossible. But the "actual value" of a quarterly income, is only susceptible of accurate measurement, by the amount actually paid each quarter.

In

> *Interstate Com. Commission* v. *Railway Co., 167 U. S. 479,*

following:

> *Cin., N. O. & Tex. R. R.* v. *Interstate Com. Commission, 162 U. S. 184-196-197,*

the Supreme Court holds that the right to fix rates is not to be implied from the power to pass upon the reasonableness of existing rates (493-4-5).

> "It is not to be supposed that Congress "would ever authorize an administrative "body to establish rates without inquiry and "examination; to evolve, as it were, out of its "own consciousness, the satisfactory solution "of the difficult problem of just and reason- "able rates * * * if it had intended to "grant the power to establish rates, it would "have said so in unmistakable terms" (p. "509).
>
> "The power to prescribe a tariff of rates "* * * is a legislative and not an adminis- "trative or judicial function (p. 505).
>
> "That congress has transferred such a "power to any administrative body is not to "be presumed or implied from any doubtful "or uncertain language. * * * If congress "had intended to grant such a power * * * "it cannot be doubted that it would have used "language open to no misconstruction, but "clear and direct" (505).

The grant of such a power is never to be implied (p. 495).

The War Revenue Act, far from implying the grant of any such power, expressly fixes the several rates of taxation, varying with the relationship of the beneficiary and the importance of the legacy, and prescribes that the tax shall be upon the "actual value"—the clear value of each legacy, thus negativing the idea that the Collector shall have the power to estimate either the earning power of the capital, or the duration of the yearly or quarterly payments which constitute the legacy.

See *Herold* v. *Kahn, 159 Fed. Rep. 608,* in which the estimate of duration of life was made and insisted upon as a basis for taxation although the beneficiary had died prior to the assessment.

See *Vicksburg R. R.* v. *Putnam,* 118 *U. S. 545.*

Scholey v. *Rew,* 90 U. S. (23 Wall.), 331:

Elwood left an estate partly in personalty and partly in realty. The personalty was invested in real estate by leave of the Court. His widow married Scholey, an Englishman. She died leaving her residuary estate to her husband. The surviving executor of Ellwood filed his bill for an accounting against Ellwood's children and the executors of Mrs. Scholey; the accounts were adjusted and partition ordered, personalty to the amount of $154,894.10 being set apart to Mrs. Scholey's executors, and the real estate to the three children.

Under the Act of 1864, imposing a succession tax upon "every (such) succession" at rates depending upon the degree of consanguinity a succession being defined as any "disposition of real "estate by will, deed or laws of descent, by rea- "son whereof any person shall become beneficially "entitled, in possession or expectancy, to any "real estate or the income thereof," a tax was imposed on the succession to Scholey. The objections were (1) That it was a direct tax on realty and not apportioned. (2) That there was no devolution of title to realty, the realty being still in the executors, who had no power to invest the personalty in it, and were under obligation to restore the investment so made into personalty

for the purpose of partition. (3) Scholey was an alien and could not take realty by devise.

The Court held the tax to be an excise or duty, and not a tax on land and not direct.

> "The succession or devolution of the estate "is the subject matter of the tax or duty, or "in other words it is *the right to become* the "successor of real estate upon the death of "the predecessor" (p. 347).
>
> The Act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction. (City Case, p. *349, note.*)

Mager v. *Grima,* 8 How., 490 (1850):

By the law of Louisiana a tax of ten per cent. was imposed on legacies to aliens and non-residents.

> "A tax of 10 per cent. on all sums or on "the value of all property, which he may "actually receive from said succession, or so "much thereof as is situated in this State, "after deducting debts due by said succes-"sion."

John Mager, a French subject, died in Louisiana. His sister, likewise a French subject, resided in France, his universal legatee, objected to the tax as beyond the Constitutional power of Congress, being a tax on exports, and as repugnant to the exclusive power of Congress to regulate commerce with foreign nations because it was a tax "on the person and rights of a foreigner residing in his own country."

The Court held that every State had the power to regulate the manner and terms upon which property may be transmitted within its dominion,

by will or by inheritance. It had no concern with commerce, or with imports or exports.

Applied—Frederickson *v.* Louisiana, 23 How., 447.
Distinguished—Dallinger *v.* Rapello, 14 Fed. Rep., 33.
Followed—Prevost *v.* Greneaux, 19 How., 7.

United States v. Perkins 163 U. S. 625.

W. W. Merriam, of New York, left all his real and personal estate to the United States Government. The State of New York assessed an inheritance tax of $3,964.33, under the *Statute of 1885* chap. 483 as amended by *Statute of 1891* ch. 215, providing that

> "all *property* which shall pass by will or by "the interstate laws of this State from any "resident of the State * * * to any per- "son &c., shall be and is subject to a tax &c.

By a statute of 1892 (Ch. 399) a tax was imposed on transfer of property of the value of $500. By § 23, certain previous laws were repealed with a saving clause (§ 24) that the repeal should not affect any act done, right accrued or acquired, or liability &c. incurred prior to the passage of the Act. §25 provided that the Act so far as in substance the same as the laws existing April 30, 1892 should be considered as a continuation of such laws, amended and not as new enactments.

Merriam died 30 Jan. 1889. Tax was not assessed until Feb. 1893—after the Statute of 1892 went into effect. Held that the New York law was

"in reality a limitation upon the power of a "testator to bequeath his property to whom "he pleases; a declaration that in the exer- "cise of that power, he shall contribute a "certain percentage to the public use * * * "The tax is not upon the property in the "ordinary sense of the term, but upon "*the right to dispose of it,* and it is not until "it has yielded its contribution to the State "that it becomes the property of the legatee."

(1) State v. Dalrymple, 70 Md. 294-299.

(2) Re Est. of Swift, 137 N. Y., 77-85.

(1) "There shall be paid *out of such property* a tax &c.

(2) This special tax is to take *from the property* a certain percentage.

Matter of Hoffman, 143 N. Y., 327.
Schoolfelde Exr. v. Lynchburg, 78 Va., 366.
Strode *v.* Commonw., 52 Pa. St. 181.
In re. Cullum, 145 N. Y., 593.
Wallace v. Myers, 38 Fed. Rep., 184.
Eyre v. Jacob, 14 Grattan, 422.
Dos Passos on Int. Tax Law, Ch. 2 § 8.
U. S. v. Fox, 94 U. S. 315.

Sturgis v. U. S. 117 U. S., p. 363.

This case is decided on the authority of *Mason v. Sargent, 104 U S. 689.* Thomas Sturgis died July 17, 1870. His will provided a bequest to his son George to be paid to him "within three months after he shall arrive at the age of twenty-

one years." George was twenty-one years old on the 21st day of February, 1872.

HELD that the legacy was not subject to a legacy tax.

UNITED STATES *v.* FIDELITY TRUST COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 280. Argued November 15, 1911.—Decided December 4, 1911.

A legacy to pay over net income to the legatee in periodical payments during the legatee's life on which the legatee has received several payments of income is not a contingent beneficial interest, but a vested life estate; and taxes paid on the value of such a legacy under the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 464, cannot be recovered under § 3 of the act of June 27, 1902, c. 1160, 32 Stat. 406. *Vanderbilt* v. *Eidman*, 196 U. S. 480, distinguished.

Congress will be presumed to use familiar legal expressions in their familiar legal sense.

45 Ct. Cls. 362, reversed.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Harr, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Paul Fuller, with whom *Mr. Barry Mohun* was on the brief, for appellees.

Mr. A. R. Serven, *Mr. H. T. Newcomb*, *Mr. Morris F. Frey* and *Mr. R. W. Joyce* also filed a brief for appellees.

Mr. George P. Montague, by leave of court, filed a brief as *amicus curiæ*.

The Attorney General, with whom *Mr. Barton Corneau* was on the brief, in opposition to motion to dismiss or affirm.

Mr. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover a portion of a succession tax paid under the act of June 13, 1898, c. 448, 30 Stat. 448,

464; the action being based on the act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." The petitioner, appellee, was residuary legatee under a will, in trust to hold the fund 'either as at present invested or in such securities as to my said trustee may be deemed safe,' and to pay over the net income to the testator's niece 'in quarterly payments during all the period of her natural life.' On June 8, 1900, the appellee made a return to the collector of internal revenue, stating that the value of the residuary estate was $120,303.94, and that of a specific legacy of silverware &c. to the niece, $500. With the aid of mortuary tables, the rate of interest being assumed to be four per cent, the clear value of the legacies to the niece was fixed at $74678.68, and an inheritance tax of $5600.90 was assessed upon it, which was paid on August 16, 1900. Up to July 1, 1902, the date fixed by the statute, the petitioner had paid to the niece $17027.59 income from the residue, and had delivered to her the specific legacy valued at $500. The tax on these sums at the rate of taxation was $1314.59, which, deducted from the whole tax paid, leaves $4286.31, to recover which this suit is brought. The appellees had judgment in the Court of Claims. 45 C. Cls. 362.

The words 'which shall not have become vested,' quoted above, mean the same as 'absolutely vested in possession or enjoyment' in a later clause ending the tax on contingent interests unless so vested before July 1, 1902. *Vanderbilt* v. *Eidman*, 196 U. S. 480, 500. On this ground it is argued at great length that only so much of the life interest of the niece as she had received before the date mentioned had vested in the sense of the clause. We are of opinion that this argument cannot be maintained. The interest of the niece was not a contingent right to income as

it should accrue in her lifetime, it was a vested life estate in a fund, changing in investment at the discretion of the trustee, but retaining its equitable identity. Objections like those that are made to treating a life estate as a present unity in the enjoyment of the life tenant might be made to the similar treatment of absolute ownership in fee. In actual life a fee can be enjoyed only minute by minute, but, although eternal in theory of law, by the same theory at every moment it is all and wholly in the owner's hands. The statute does not invite speculation in a new nomenclature, or attempt to reach profounder conceptions than those familiar to the law. When it speaks of interests absolutely vested in possession we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment. No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun; none that more clearly and absolutely excludes the qualification 'contingent' in the sense of the law. *Vanderbilt* v. *Eidman*, 196 U. S. 480, concerned a life estate in remainder, which, whether the remainder was technically vested or contingent, *Ibid.* 501, 502, was not vested in possession or enjoyment. It was assumed that the tax was payable in a case like this. *Ibid.* 488, 495.

Decree reversed.